

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,222
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALFRED D. McCLELLAN, Executor of the Estate of ANNE
G. McCLELLAN, *Appellant*,

v.

VIRGINIA M. NEWBY, *Appellee*.

623

Appeal from the United States District Court
United States Court of Appeals
for the District of Columbia
For the
District of Columbia Circuit

FILED DEC 31 1951.

Joseph W. Stewart
CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,222

ALFRED D. McCLELLAN, Executor of the Estate of ANNE
G. McCLELLAN, *Appellant*,

v.

VIRGINIA M. NEWBY, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

748

Filed Nov 28 1950

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Defendant's Ex. 1

LAST WILL AND TESTAMENT

OF

ANNE G. McCLELLAN

I, Anne G. McClellan, of Washington, D. C., to make, publish and declare this to be my last will and testament, hereby revoking all wills and codicils by me at any time heretofore made.

Item 1. I give, devise and bequeath unto my daughter, Virginia M. Newby, of Chevy Chase, Maryland, my certain real estate located at 3216 Klinge Road, N. W., Washington, D. C., absolutely and in fee simple.

Item 2. I give and bequeath unto my son, Marshall M. Morgan, Jr., the sum of Five Hundred Dollars (\$500.00).

Item 3. I give, devise and bequeath unto my husband, Alfred D. McClellan, my residence located at 3218 Klinge Road, N. W., Washington, D. C., absolutely and in fee simple.

Item 4. I give, devise and bequeath all the rest, residue and remainder of my property and estate of any character whatsoever, absolutely and in fee simple unto my husband, Alfred D. McClellan, and should my said husband predecease me and in that event only, I give, devise and bequeath all of my said property and estate absolutely and in fee simple unto my said daughter, Virginia M. Newby.

Item 5. I hereby nominate, constitute and appoint Alfred D. McClellan, my husband, executor of this my

last will and testament, with full power of sale of real estate and request that he be not required to furnish bond in his capacity as executor.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal at Washington, D. C., this the 1st day of November, 1946.

/s/ Anne G. McClellan (SEAL)

The foregoing instrument, at the time and place thereof, subscribed, sealed, published and declared by Anne G. McClellan as and for her Last Will and Testament, in our presence, and in the presence of one another,
749 hereunto subscribe our names as attesting witnesses thereto, the day and year last above written.

/s/ Louis Horowitz

Address

416 5th St. N. W.,
Washington, D. C.

/s/ Thomas M. Baker

Address

416 5th St. N. W.,
Washington, D. C.

754

Filed Dec 27 1950

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding a Probate Court

In re, Estate of
ANNE G. McCLELLAN, Deceased.
Administration No. 76811

Address of Petitioner
3218 Klinge Road, N. W.,
Washington, D. C.

Petition for Probate of Will and for Letters Testamentary

The Petition of Alfred D. McClellan, respectfully represents unto this Honorable Court:

1. That your petitioner is a citizen of the United States and a resident of the District of Columbia, of adult age, and files this petition as the executor nominated in the Will of the above named decedent.

2. That Anne G. McClellan, late an adult citizen of the United States, domiciled in the District of Columbia, died on the 21st day of November, 1950, leaving a paper in the nature of a Last Will and Testament, bearing date the 1st day of November, 1946, in which this petitioner is named the executor, which said Will is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and this petitioner believes that the above named paper writing is in fact the Last Will and Testament of said decedent.

3. That said Testatrix was survived by her husband, this Petitioner, Alfred D. McClellan, an adult, who resides in the District of Columbia; Virginia M. Newby, 2706 East West Highway, Chevy Chase, Maryland, adult daughter, and Marshall M. Morgan, Jr., % Virginia M. Newby, 2706 East West Highway, Chevy Chase, Maryland, adult son; that said Testatrix was not survived by any other child or descendant.

4. At the time of her death said Testatrix was seized of the following real estate in the District of Columbia:

Lot Twenty Six (26) in Square Two Thousand One
755 Hundred One (2101) improved by premises 3218
Klinge Road, N. W., which property Petitioner estimates to be worth about \$15,000.00; subject to an existing deed of trust having a present balance of \$4,000.00, plus interest.

5. Said Testatrix was at the time of her death possessed of personal property of a total estimated value of Five Hundred Dollars consisting of personal effects and household furniture.

6. The debts of the decedent consist principally of eight Five Hundred Dollar Deed of Trust Notes for a total indebtedness of Four Thousand Dollars, plus interest, secured by a deed of trust on said Lot 26 in Square 2101, improved by Decedent's real estate 3218 Klinge Road, N. W.; \$60.00 interest on above notes to National Savings and Trust Company due December 2, 1950; \$132.00 taxes due on Decedent's said real estate; S. H. Hines Company, 338.96, decedent's funeral expenses; Cedar Hill Cemetery for lot and opening decedent's grave \$190.00; Dr. Philip O. Pelland, 900 - 17th Street, N. W., \$150.00 medical services for decedent; Dr. J. Warren Casidy, 5022 Reno Road, N. W., \$80.00, medical services in decedent's last illness.

WHEREFORE Petitioner prays:

1. That citation may issue against the above named heirs at law and next of kin, and that notice by publication may issue, directed to any of them who may be returned not to be found.

2. That said paper writing dated the 1st day of November, 1946, be admitted to probate and record as the Last Will and Testament of the said Anne G. McClellan, deceased, as to both real and personal property.

3. That Letters Testamentary may issue to this Petitioner as the Executor named in the Will.

4. And for such other and further relief as the nature of the case may require and to the Honorable Court shall seem proper.

/s/ Alfred D. McClellan
Alfred D. McClellan,
Petitioner

756 /s/ JOSEPH D. MALLOY
 JOSEPH D. MALLOY,
 Hibbs Building,
 Washington, D. C. Di. 3876
 Attorney for Petitioner

District of Columbia, ss:

Alfred D. McClellan, being first duly sworn deposes and says that he has read the foregoing Petition by him subscribed and he knows the contents thereof; that he verily believes the matters therein stated are true.

/s/ Alfred D. McClellan
 Alfred D. McClellan

Subscribed and sworn to before me this 27th day of December, 1950.

/s/ Elizabeth Maynard
 Notary Public, D. C.

(SEAL)

I personally guarantee the payment of costs amounting to \$15.00.

/s/ Joseph D. Malloy
 Attorney

* * * *

759 Filed Jan 19 1951 Theodore Cogswell
 Register of Wills, D. C. Clerk of Probate Court

Petition for Caveat

The petition of Virginia M. Newby respectfully represents to this Honorable Court:

1. That Virginia M. Newby is a citizen of the United States and a resident of Montgomery County, Maryland, and that she is a daughter of Anne G. McClellan, deceased, and is of full age.

2. That petitioner has notice that a certain paper writing bearing date of November 1, 1946 has been filed

in the Honorable Court as the last will and testament of said Anne G. McClellan, deceased.

3. That her interest will be injuriously affected by the allowance of said pretended will, or its admission to probate; that she hereby does contest the probate and validity of said paper writing purporting to be the last will and testament of Anne G. McClellan, deceased, and for that purpose alleges:

First: that said paper writing, bearing date of November 1, 1946, is not the last will and testament of said deceased.

Second: that the attesting witnesses to said alleged will did not nor any one of them sign his name as a witness to the said alleged will at the request of the said Anne G. McClellan.

760 Third: that the said deceased was not, at the time of the making and subscribing, or of the acknowledging, by her of said paper writing, of sound mind and memory or in any respect capable of making a will.

Fourth: that the said paper writing, purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Anne G. McClellan by fraud and deceit exercised upon her by one Alfred D. McClellan or some other person or persons unknown to petitioner.

Fifth: that the said paper writing, purporting to be the last will and testament of said deceased, was obtained and the execution thereof procured from the said Anne G. McClellan by the undue influence, duress and coercion exercised upon her by one Alfred D. McClellan or some other person or persons unknown to petitioner.

5. That petitioner is advised that a period of at least several months will elapse before a determination of the issues to be framed upon the caveat can be had, and petitioner accordingly, states that a collector should be appointed to collect, conserve and administer upon the assets of the estate of the decedent, pending the conclusion of this litigation.

WHEREFORE, the premises considered, the petitioner prays:

1. That process may issue from this Court requiring the parties in interest to answer the exigencies of petitioner.

2. That said paper writing may be refused probate.

3. That issues may be framed between the caveator and the caveatee of the will, to be tried by jury to determine the facts of the alleged will.

4. That a collector or collectors may be appointed to take charge of the estate of the deceased, to serve under bond until the termination of this caveat proceeding.

5. And for such other and further relief as to the Court may seem meet and proper.

761 /s/ Virginia M. Newby
Virginia M. Newby

/s/ Benjamin H. Dorsey
Benjamin H. Dorsey
1025 Connecticut Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

District of Columbia, ss:

I, Virginia M. Newby, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the statements therein made

of my personal knowledge are true, and those made as upon information and belief, I believe to be true.

/s/ Virginia M. Newby
Virginia M. Newby

Subscribed and sworn to before me this 19 day of January 1951.

/s/ Virginia S. Breen
Notary Public, District of
Columbia

My Commission Expires April 14, 1954

(SEAL)

I hereby certify that service of the foregoing caveat was made upon Joseph D. Malloy, 725 15th Street, Attorney for proponent, by mailing a copy to him at the aforesaid address, postpaid, on Jan. 19, 1951.

/s/ Benjamin H. Dorsey

* * * *

763 Filed Jan 30 1951 Theodore Cogswell
Register of Wills, D. C. Clerk of Probate Court

Answer to Petition for Caveat

The Answer of Alfred D. McClellan, the executor named in that certain paper writing bearing date the 1st day of November, 1946, filed in this Court and purporting to be the last Will and Testament of Anne G. McClellan, deceased, to the Caveat of Virginia M. Newby says:

1. This respondent admits the allegations of Paragraph One of said Petition.
2. This respondent admits the allegations of Paragraph Two.
3. Answering the allegations of Paragraph Three of said Petition, this respondent states as follows:

First: This respondent denies the allegation that the said paper writing bearing date the 1st day of November, 1946, is not the last Will and Testament of Anne G. McClellan, deceased.

Second: This respondent denies the allegation that the attesting witnesses to said Will did not sign their names as witnesses thereto at the request of the said Anne G. McClelland.

Third: This respondent denies the allegation that said decedent was not, at the time of the making and subscribing, or of the acknowledging, by her of said paper writing, of sound mind and memory, or in any way capable of making a will.

Fourth: This respondent denies the allegation that the said paper writing purporting to be the last Will and Testament of said deceased, was obtained and the execution thereof, procured by fraud and deceit exercised upon her by Alfred D. McClellan, this respondent,
764 or by some other person or persons unknown to petitioner.

Fifth: This respondent denies the allegation that said paper writing was subscribed and published by said decedent under undue influence, duress and coercion exercised over her by Alfred D. McClellan, this respondent, or some person or persons unknown to petitioner.

Further answering, this respondent, upon information and belief, avers the facts to be that the said paper writing, bearing date the 1st day of November, 1946, is the last Will and Testament of Anne G. McClellan, deceased: that at the time of the execution thereof, the said Anne G. McClellan was of sound and disposing mind and capable of executing a valid will, deed or contract; that at the date of her execution of said Will, the decedent declared to the attesting witnesses that said paper writing was the last Will and Testament of her, the said Anne G

McClellan; that all of the attesting witnesses signed their names as witnesses to the said Will at the request of the said Anne G. McClellan, in her presence, and in the presence of each other; and that the said paper writing was not executed under fraud, coercion, duress or undue influence of Alfred D. McClellan, this respondent, or any person or persons whatsoever.

Further answering, this respondent says that he is willing that issues may be framed and tried before a jury as by law provided, in order that the truth of the allegations of the aforesaid caveat may be determined.

5. This respondent is without knowledge as to the period of time before the determination of any issues to be framed on the caveat, if that be material, and denies the other allegations in Paragraph Five.

/s/ Alfred D. McClellan
Alfred D. McClellan,
Respondent

/s/ Joseph D. Malloy,
Joseph D. Malloy,
Hibbs Building,
Washington 5, D. C.
Attorney for Respondent

765 District of Columbia, ss:

Alfred D. McClellan being first duly sworn on oath deposes and says that he has read the foregoing Answer to Petition for Caveat by him subscribed and knows the contents thereof; that the matters therein stated are true except those stated on information and belief, which he believes to be true.

/s/ Alfred D. McClellan
Alfred D. McClellan

Subscribed and sworn to before me this 30th day of January, 1951.

/s/ Milton Conn
Notary Public, D. C.

A copy of the foregoing Answer to Petition for Caveat served upon Benjamin H. Dorsey, 1025 Connecticut Avenue, N. W., Washington, D. C., Attorney for Petitioner, by mailing same to him at the above office address this 30th day of January, 1951.

/s/ Joseph D. Malloy
Joseph D. Malloy

* * * *

774

Filed Feb 28 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Order Framing Issues

Upon consideration of the caveat of Virginia M. Newby, filed herein against a certain paper writing bearing date of November 1, 1946, filed herein, purporting to be the last will and testament of Anne G. McClellan, deceased, and of the answer of Alfred D. McClellan, filed thereto, it is by the Court this 28th day of February 1951,

ORDERED, That the following issues be and they are hereby framed to be tried before a jury on the 2nd day of April, 1951:

One: Was the paper writing filed in this Court and bearing date of November 1, 1946, the last will and testament of Anne G. McClellan, deceased?

Two: Was the said paper writing dated November 1, 1946, purporting to be the last will and testament of Anne K. McClellan, deceased, executed and attested in due form, as required by law?

Three: Was the said Anne G. McClellan at the time of the making and subscribing or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

Four: Was the said paper writing dated November 1, 1946, obtained, or the execution thereof, or the subscription thereto procured from the said Anne G. McClellan, deceased, by fraud or deceit practiced upon the said Anne G. McClellan by Alfred D. McClellan or any other person or persons?

775 Five: Was the said paper writing dated November 1, 1946, obtained, or the execution thereof procured from the said Anne G. McClellan, deceased, by the undue influence or duress, or coercion of Anne G. McClellan or any other person or persons?

/s/ Edward A. Tamm

Judge

Seen:

/s/ Joseph D. Malloy
Attorney for Caveatee

* * * *

879

Filed Apr 12 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Praecipe

I, M. Marshall Morgan, Jr., having long been fully advised that my sister, Virginia M. Newby, has filed a caveat to the will of my late mother, Anne G. McClellan, and having retained counsel, Benjamin H. Dorsey, to advise me in this matter, and having personally appeared at the pre-trial of this above entitled case and being aware that the trial of this case is imminent, do hereby give notice to one and all that I do not intend to become a party to this case and waive all my rights to appear in this action.

/s/ M. Marshall Morgan, Jr.
M. Marshall Morgan, Jr.

* * * *

881 Filed Apr 12 1951
Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Pretrial Proceedings.

STATEMENT OF NATURE OF CASE:

Caveat.

Caveator is a daughter (and one of the two sole heirs) of the decedent, Anne G. McClellan. She claims:

(1) That the paper writing dated November 1, 1946 is not the last will and testament of the decedent.

(2) That the attesting witnesses, nor any of them, signed same at the request of the decedent.

(3) That the decedent lacked testamentary capacity on the date said paper writing was executed.

(4) That said paper writing was obtained and the execution thereof procured from the decedent by fraud and deceit exercised upon her by Alfred D. McClellan, or some other person or persons unknown to them.

(5) That said paper writing was obtained and the execution thereof procured from said decedent, by the undue influence, duress and coercion of Alfred D. McClellan, or some other person or persons unknown to them.

Caveatee denies the claims of caveators, and assert that the purported will is in fact a valid will; is in fact the last will of said decedent; that the decedent was possessed of testamentary capacity at the time of its execution; and denies undue influence, fraud, coercion or duress. Caveatee also claims that he executed a reciprocal will at the same time, leaving his estate to decedent should he predecease her; that he likewise designated her

his beneficiary in insurance and retirement funds.

882 STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

The following six papers, stamped as "pre-trial exhibits" and initialed by the Pre-Trial Judge, shall be received in evidence without formal proof thereof, subject only to objection as to materiality and relevancy:

(1) Original marriage license of decedent and caveatee.

(2) Receipt of Cedar Hill cemetery for purchase of burial lot by caveatee.

(3) Receipt of S. H. Hines Co. for decedent's funeral services.

(4) Duplicate of caveatee's change of beneficiary on his Civil Service retirement.

(5) Insurance policy of Shenandoah Life Insurance Company on life of caveatee, showing change of beneficiary to decedent's name; and

(6) Last will and testament of caveatee, executed by him simultaneously with the purported last will of the decedent herein.

DATED: April 12, 1951

/s/ Edward M. Curran
Pre-trial Judge.

REMARKS of Pretrial Judge for consideration of trial judge:

Attorneys authorized to act:

/s/ Irving G. McCann
Of counsel for Caveators.

/s/ Earl H. Davis
Of counsel for Caveatee.

* * * *

884 Filed April 13 1951 Theodore Cogswell
Register of Wills D. C. Clerk of Probate Court

Motion for Order Aligning Parties, Etc.

Comes now Alfred D. McClellan, nominated executor under the will of the above decedent, and Caveatee herein, by and through counsel, and advises the Court that although an order framing issues has been signed, a trial date for such issues set, and the pre-trial order signed, the parties have been unable to agree upon an order aligning the parties to this caveat; wherefore, the caveatee moves that this Court sign an order aligning the parties to this contest, and that M. Marshall Morgan, Jr., adult son of the above decedent, who has appeared herein by praecipe, be aligned herein as a party plaintiff together with his sister, the formal caveator herein, for the following reasons:

(1) Said brother and sister are the only heirs at law of the above decedent, and will share equally in this estate should this will be declared invalid for any reason;

(2) Said M. Marshall Morgan, Jr. (son of the decedent and brother of the caveator) is represented by the same counsel who represent caveator;

(3) Should said individual be called as a witness for either side in this contest, his status as a witness, i. e.—whether adverse, hostile, or corroborative, should be known in advance to the party calling him.

(4) And for other reasons apparent from the record.

/s/ Earl H. Davis
 Earl H. Davis, Esq.,
 Of counsel for Caveatee.
 900 F St., N. W.,
 Wash. 4, D. C.

885

Authorities

Rich. v. Lemmon, 15 App. D. C. 507; 28 W. L. R. 27
 Mersch, Probate Court Practice in D. C. (1939).

The record in the instant contest.

* * * *

886

Filed Apr 13 1951
 Theodore Cogswell, Register of Wills, D. C.
 Clerk of Probate Court

Motion for Summary Judgment

Comes now Alfred D. McClellan, Executor duly nominated under the will of the above named decedent, by and through counsel, and move the Court for summary judgment in favor of the Executor, and in favor of the validity of the will under attack, for the following reasons:

(1) The said will of the decedent herein has been attacked on five (5) grounds, as set forth in the Petition for Caveat.

(2) On March 21, 1951, an exhaustive deposition was taken of the Caveator, she being interrogated specifically as to each and all of the five grounds of attack set forth in her Caveat, and from her answers, on file in this Court, it appears that there is no genuine issue as to any material fact surrounding any and all of the said five grounds of attack.

(3) (a) The Caveator's allegation that the will of Nov. 1, 1946 is not the last will and testament of the decedent is completely negatived by her testimony on pages 12, 13 and 14 of her deposition.

(b) The Caveator's allegation that the attesting witnesses did not attest the testatrix's signature at her request, is completely devoid of proof, as appears from her answers on pages 17 and 18 of her deposition. In any event, this allegation is not material, as our law does not require a testator to request the attesting witnesses to sign a will as such. (19-103, D.C. Code, 1940 Ed.)

(c) The allegation that the decedent lacked testamentary capacity is completely devoid of proof, as appears from the caveator's testimony of pages 19, 20, 23, 26 and 28 of her deposition.

887 (d) The caveator's allegations as to fraud and
deceit are likewise devoid of proof, as appears from her testimony of pages 29, 30 and 34 of her deposition.

(e) The caveator's allegations as to undue influence, duress and coercion are so vague and indefinite, and so devoid of proof, as appears from her responses and testimony of pages 33, 36, and 37 of her deposition, that it would be merely asking a jury to speculate and guess as to a verdict one way or the other.

/s/ Earl H. Davis,
Earl H. Davis,
900 F St., N. W.
and

/s/ Joseph D. Malloy,
Joseph D. Malloy,
Hibbs Bldg.,
Wash., D. C.
Attorneys for Executor.

* * * *

897

Filed May 4 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Order

The above entitled cause having come on for hearing before the Court on motion of defendant, caveatee for Summary Judgment, the Court having considered the points and authorities in support of and in opposition to that motion, and argument of counsel having been heard, it is hereby this 4th day of May, 1951,

ORDERED, that caveatee's motion for Summary Judgment be, and the same hereby is, denied.

/s/ Edward A. Tamm,
Judge.

* * * *

898

Filed May 4 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Order

The above entitled cause having come on for hearing before the Court on motion of caveatee for an Order Aligning M. Marshall Morgan, Jr., as a party plaintiff with his sister, the caveator, the Court having considered the points and authorities in support of and in opposition to that motion, and argument of counsel having been heard, it is hereby this 4th day of May, 1951,

ORDERED, that caveatee's motion for an Order Aligning M. Marshall Morgan, Jr., as a party plaintiff with his sister, the caveator, be, and the same hereby is, denied.

/s/ Edward A. Tamm,
Judge.

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

This cause coming on to be heard upon the issues framed upon the caveat and answer thereto, it is by the Court, this 11th day of May, 1951,

/s/ Jas. W. Morris,
Judge.

• • • •

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

v.

Now come here again the parties aforesaid in manner aforesaid and the same jury that was respited yesterday:

whereupon the trial was resumed and the jury, after the case is given them in charge, upon their oath say:

In answer to the *First Issue*:

Was the paper writing filed in this Court and bearing date of November 1, 1946, the last will and testament of Anne G. McClellan, deceased?

They answer "No"

In answer to the *Second Issue*:

Was the said paper writing dated November 1, 1946, purporting to be the last will and testament of Anne G. McClellan, deceased, executed and attested in due form, as required by law?

They answer "Yes" (By direction of the Court)

In answer to the *Third Issue*:

Was the said Anne G. McClellan at the time of the making and subscribing, or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

They answer "No"

In answer to the *Fourth Issue*:

Was the said paper writing dated November 1, 1946, obtained, or the execution thereof, or the subscription thereto procured from the said Anne G. McClellan, deceased, by fraud or deceit practiced upon the said Anne G. McClellan by Alfred D. McClellan or any other person or persons?

They answer "Yes"

986 Recorded Proceedings

Book 203, Page 344

In answer to the *Fifth Issue*:

Was the said paper writing dated November 1, 1946, obtained, or the execution thereof procured, from the said

Anne G. McClellan, deceased, by the undue influence, duress, or coercion exercised upon Anne G. McClellan by Alfred D. McClellan or any other person or persons?

They answer "Yes"

Docket Entries

1951 May 23, Issue No. 1, answered "No" Issue No. 2, answered "Yes" (By direction of the Court) Issue No. 3, answered "No" Issues Nos. 4, and 5, answered "Yes". Verdict setting aside Will.

Proceedings before Civil Division Number One, of the United States District Court for the District of Columbia, holding a special term as a Probate Court for the trial of Will Contests. Judge Morris Presiding.

Harry M. Hull, Clerk,
George A. Watts, Deputy Clerk.

* * * *

988 Jury List. Civil Division No. Case No.
..... Cal. No. Plaintiff *Estate of* ...
v. Defendant..... Atty. for plff. *Anne G.*
McClellan.... Atty. for defdt..... *Adm 76811*.... Judge
Date *May 11, 1951*....

No.	Name of Juror	Excused By
34	Mimi F. Ogens	
32	Ann E. Milstead	1
28	Lillian L. McDermot	2
15	Hugh E. Fraser	3
9	Cecil E. Bitting	Plaintiff
61	John T. Dean	4
27	Chester L. Louers	5
96	Mary J. Ranfeisen	
57	Genie Brown	6

18	Louis S. Grasso	Plaintiff
4	Frank A. Ball	7
42	George W. Shaffer	8
80	Howard M. Lee	9
77	Tillie L. Kruse	
91	Calvin S. Orth, Sr.	10
81	Maurice Liebenberg	11
59	Norman C. Crews	12
5	Esther N. Baxter	
87	Maude L. Nichols	
74	Ruth L. Jarvis	
97	Howard S. Rappleye	Plaintiff
52	John W. Beckwith, Sr.	
50	Robert B. Atkinson	
41	James Seeney	

Reported by Edward L. Bettis

* * * *

993

Filed May 29 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

*Motion for Judgment Notwithstanding the Verdict, or in
the Alternative, for New Trial*

Comes now the caveatee, Alfred D. McClellan, in the above cause, by and through counsel, and being aggrieved by the verdict of the jury in said cause on Wednesday, May 23, 1951, respectfully moves this Honorable Court for judgment in his favor, in accord with his several motions for directed verdict made during the progress of said trial, notwithstanding the verdict of the jury; or in the alternative, for a new trial of the issues herein; and as reasons therefor, caveatee, through counsel, states as follows:

- (1) The said verdict was contrary to law;
- (2) The said verdict was contrary to the evidence;
- (3) The said verdict was contrary to the weight of the evidence;

(4) The Court erred in denying caveatee's Requests for Instructions Nos. 8 and 10, and 3 and 4 as drawn.

(5) The Court erred in receiving in evidence the testimony of Dr. Albert E. Marland, who had never seen or examined the testatrix, and in permitting him to express an opinion not based upon the entire evidence, nor in fact, all the evidence then in; and in refusing to strike from the record the testimony of such witness.

(6) The Court erred in permitting caveator to delve into the past life and history of the testatrix for a period of over 25 years, and in not confining the testimony on the question of lack of testamentary capacity to within a reasonable period of the date the will in question was executed.

(7) The verdict was occasioned by the inflammatory argument, both opening and closing, of counsel for caveator, much of which was not based upon the evidence.

(8) The Court erred in failing to direct cave-
 994 ator's counsel to confine his rebuttal argument to facts in evidence, and not within his personal knowledge, and the Court erred in commenting upon such argument, to the prejudice of caveatee.

(9) And for other reasons apparent from the record, which will be called to the attention of the court at the argument hereon.

Respectfully submitted,

/s/ Earl H. Davis

Earl H. Davis, Esq.,

Of counsel for Caveatee.

900 F St., N. W.

Wash. 4, D. C.

* * * *

1006

Filed Jun 18 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Affidavit of Miss R. Maude Hodgkin

DISTRICT OF COLUMBIA, SS:—

Miss R. Maude Hodgkin, being first duly sworn according to law, on oath deposes and says as follows:

That she is a resident of the District of Columbia, presently residing at 2205 California Street, N. W., Apartment No. 303, and was personally served with a subpoena on the above cause, requiring her presence before Judge Morris on Monday, June 11, 1951; but being physically unable to respond to such subpoena due to illness and confinement, makes this affidavit in lieu of her personal appearance.

That affiant was the owner, operator and manager of the Waverly Sanitarium, located on the Rockville Pike, in Montgomery County, Maryland (about one-half mile north of Georgetown Prep School), from 1923 to 1944, when she sold said business to one Dr. Huff.

That during affiant's conduct of this Sanitarium, it was her and her staff's firm policy not to accept either mental or alcoholic cases for treatment, and the Sanitarium accepted only nervous or convalescent patients, and was regarded primarily as a rest home.

That affiant has checked her records for the entire period she operated said Sanitarium, and finds that one Anne G. Morgan was a patient at the Waverly Sanitarium on only one occasion, and that was from February 17, 1932 to February 26, 1932, on which latter date she left (a total of 9 days), at which time she was a patient of Dr. Roy D.

Adams. Anne G. Morgan was not a patient at Waverly in 1941 or 1942.

/s/ R. Maude Hodgkin
R. Maude Hodgkin

1007 Personally appeared before me, a Notary Public in and for the District of Columbia, the aforesaid R. Maude Hodgkin, who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing and annexed affidavit by her subscribed, are true and correct to the best of her knowledge and belief.

/s/ R. Maude Hodgkin
R. Maude Hodgkin

Sworn and subscribed to before me this 14th day of June, 1951.

/s/ Etta Louise Taggart
Etta L. Taggart,
Notary Public, D. C.

My commission expires July 14, 1954.
(SEAL)

• • • •

1008 Filed Jul 6 1951
Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Order Denying Probate

It appearing to the Court that the issues framed in the above entitled cause were duly submitted to the jury for determination, and that said jury answered the first issue, to wit: "Was the paper writing filed in this Court and bearing date November 1, 1946, the last will and testament of Anne G. McClellan, deceased?" in the negative;

That the jury answered the second issue, to wit: "Was the said paper writing dated November 1, 1946 purport-

ing to be the last will and testament of Anne G. McClellan, deceased, executed and attested in due form, as required by law?" in the affirmative, by direction of the Court;

That the jury answered the third issue, to wit: "Was the said Anne G. McClellan at the time of the making and subscribing or of the acknowledging by her of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?" in the negative;

That the jury answered the fourth issue, to wit: "Was the said paper writing dated November 1, 1946, obtained, or the execution thereof, or the subscription thereto procured from the said Anne G. McClellan, deceased, by fraud or deceit practised upon the said Anne G. McClellan by Alfred D. McClellan or any other person or persons?" in the affirmative;

1009 Recorded Proceedings
Book 204, page 405

That the jury answered the fifth issue, to wit: "Was the said paper writing dated November 1, 1946, obtained, or the execution thereof procured from the said Anne G. McClellan, deceased, by the undue influence or duress, or coercion of Anne G. McClellan by Alfred D. McClellan or any other person or persons?" in the affirmative:

It is by the Court this 6 day of July, 1951.

ADJUDGED, ORDERED and DECREED, that the prayers of the petition of Alfred D. McClellan for probate and record of the paper writing filed in this cause purporting to be the last will and testament of the said Anne G. McClellan, deceased, be and is hereby denied; that the paper writing dated November 1, 1946, purporting to be the last will and testament of the said Anne G. McClellan, deceased, be and the same is hereby denied probate and record as such will and testament of said Anne G. McClellan, deceased, and it is further

ADJUDGED, ORDERED, and DECREED, that the said Anne G. McClellan, deceased, died intestate.

/s/ Jas. W. Morris,
Judge.

* * * *

1010

Filed Jul 6 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Order Denying Motion for a New Trial

This cause came on to be heard the 6th day of July, 1951, upon caveatee's motion for a judgment notwithstanding verdict and a new trial, and after argument by counsel on both sides in open court, and upon consideration thereof, it is, by the Court, this 6th day of July, 1951,

ORDERED, That said motions be and the same are hereby denied.

/s/ Jas. W. Morris,
Judge.

* * * *

1012

Filed Aug 4 1951

Theodore Cogswell, Register of Wills, D. C.
Clerk of Probate Court

Notice of Appeal

Notice is hereby given this 4th day of August, 1951, that Alfred D. McClellan, Caveatee, (the nominated Executor) hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 6th day of July, 1951 in favor of Virginia

M. Newby, Caveator against said Alfred D. McClellan, Caveatee.

/s/ Earl H. Davis,
Earl H. Davis,
Attorney for Caveatee,
1020 Washington Loan &
Trust Bldg.,
900 F Street, N. W.
Washington 4, D. C.
EX. 3598.

* * * *

7

Louis Horowitz

* * * *

Direct Examination

BY MR. DAVIS:

Q Mr. Horowitz, will you state your full name to His Honor and the members of the Jury, please? A Louis Horowitz.

* * * *

Q And your occupation? A I am an attorney.

Q Are you a member of the District of Columbia Bar? A I am.

Q How long have you been engaged in the active private practice of law in this City? A Since 1928.

Q Since 1928. And have you been continuously engaged in the practice of law since that date? A I have.

Q In addition to your duties as a member of the Bar in private practice, do you hold any other rank or title? A I am a Notary Public for the District of Columbia.

8 Q How long have you been a commissioned Notary Public in this jurisdiction? A Oh, between 20 and 25 years. I would say probably 25 years.

Q Now, directing your attention to November 1st, 1946, was your office then in the Columbian Building, 416 5th Street? A It was, and still is.

Q Are you still occupying the same room, or suite of rooms? A Yes, sir.

Q I show you this paper, Mr. Horowitz, and ask you if you can identify the first signature on the second sheet of that document? A You mean this signature (indicating)?

Q Yes. A Yes, sir.

Q Whose signature is that, sir? A That is mine.

Q Can you identify the signature of the second party, Thomas M. Baker? A I can. Yes, sir.

Q Were those signatures placed on that paper at the same time? A They were. That is to say, I placed mine first, and Mr. Baker placed this after I put my name there.

9 Q You affixed your signature first, and then Mr. Baker signed his signature and address? A That is true.

Q I will ask you if you can identify the signature on the front page of this paper writing, that of Anne G. McClellan? A Yes, sir.

Q Did you witness that signatory party affixing her signature? A I did, sir.

Q Will you describe the circumstances under which Mrs. McClellan affixed her signature to this paper, and you and Mr. Baker affixed your signatures? A May I see the paper, sir?

Q Yes. (Hands to the witness.) A On the first day of November of 1946 Mr. Malloy asked Mr. Baker and myself to act as witnesses to the will of Anne G. McClellan. My office at that time was right next to Mr. Malloy's, and Mr. Baker's office was across from my office. We were on the first floor at that time. Since then, of course, Mr. Malloy has other offices. And Mr. Baker and myself came in to witness Mrs. McClellan's signa-

ture, or her signature to this will, and there was also present at that time, Mr. McClellan.

Q Can you identify Mr. McClellan in Court
10 today? A The gentleman over there (indicating Mr. Alfred D. McClellan, the Caveatee).

Q Was there anyone else present on that occasion, aside from yourself, Mr. Baker, Mr. and Mrs. McClellan, and Mr. Malloy? A To the best of my knowledge, no.

Q Were these parties all together in your office, or in Mr. Malloy's office? A In Mr. Malloy's office.

Q And who signed that paper first? A If I recall correctly, I believe Mr. Malloy indicated to Mrs. McClellan at that time whether this was her last will and testament, and I think she said yes. And then he asked her whether she wanted Mr. Baker and myself to witness her will, and she said yes. So she signed first. Mr. Baker and myself and in the presence of Mr. Malloy and Mr. McClellan, witnessed her signature. She put her name on this. And after that I signed as a witness. I put my name on this will, and my address. And while I was writing, Mr. Baker was there. Then I witnessed Mr. Baker's signature on this will, and he put his name and his address. And this took place in the presence of Mr. Malloy, Mr. McClellan, Mrs. McClellan, Mr. Baker and myself, in Mr. Malloy's office.

Q The question I want specifically answered is, did she acknowledge to you that paper was her last
11 will and testament? A Mr. Malloy, to the best of my knowledge, asked her whether this was her last will and testament. I don't know the exact words, but he indicated to her that, whether this was her last will and testament.

Q What was her response? A Yes. I wouldn't say that was word for word, but he did ask her whether that was her last will and testament and whether she wanted Mr. Baker and myself to witness the signature, and she said yes.

MR. DAVIS: Will you mark this, please, as Defendant's Exhibit No. 1?

THE COURT: That will be so marked for identification.

(Thereupon the will of Anne G. McClellan, deceased, was marked Defendant's Exhibit No. 1 for identification.)

MR. DAVIS: Now, will you mark this paper, Mr. Watts, as Defendant's Exhibit No. 2 for identification?

(Thereupon, the paper referred to was marked Defendant's Exhibit No. 2 for identification.)

BY MR. DAVIS:

Q Mr. Horowitz, I hand you this second paper, which has been marked by the Clerk, Defendant's Exhibit No. 2 for identification, and ask you if you can identify the signatures on that paper? A Yes, sir.

12 Q Whose signatures are they, sir? A This is the signature of Alfred D. McClellan, witnessed by myself and Mr. Baker. The circumstances which I have described concerning Mrs. McClellan practically were the same circumstances surrounding this will.

That is to say, on the first day of November, 1946, in Mr. Malloy's office, Mr. Baker and myself acted as witnesses to Mr. Alfred D. McClellan's will, and the same circumstances whereby all persons who were present, signing, were identified with the statements I made before. And, in fact, Mrs. McClellan was also present when Mr. McClellan signed that will.

Q In other words, these two wills, the will of Mr. McClellan and the will of Mrs. McClellan, were executed the same day, in the same place, and before the same witnesses? A They were executed the same day, in the same place, in Mr. Malloy's office. But I would not say for a certainty whether this will was the first one signed, or Mrs. McClellan's was the first one signed, but they were practically simultaneously signed.

Q Can you approximate the length of time, Mr. Horowitz, that these ceremonies consumed? A To the best

of my recollection I would say maybe five or ten minutes. Perhaps the reason for that is, as it comes back to my mind, all of the parties seemed to be more
 13 or less jovial in their attitude toward the occasion.

I think, if I recall correctly, I think Mr. Baker, who is a gentleman much older than all of us, made some remark concerning age, and maybe Mr. Malloy may have made a remark, sort of a jovial remark. And I think Mrs. McClellan was—appeared to be in more or less jovial or excellent spirits.

Q Had you ever seen either Mr. McClellan or Mrs. McClellan prior to the date of these papers—November 1st, 1946? A I have only seen Mrs. McClellan once, the day she signed her last will. I have seen Mr. McClellan three times.

Q I mean before November 1st, 1946. A No. I was going to say the day he signed the will, about a month ago when I was informed that this case was coming up in court, and Mr. Malloy brought Mr. McClellan in for identification purposes, and today in court.

Q But you never saw him prior to the day he executed his will? A I don't know either party.

Q Now, did you see Mrs. McClellan prior to November 1st, 1946? A No, sir; never knew either party before.

* * * *

14 BY MR. DAVIS:

Q In the five or ten minutes it took to complete these legal formalities, did you have occasion to observe Mrs. McClellan? A I did.

* * * *

18 BY MR. DAVIS:

Q Mr. Horowitz, in the five or ten minutes you say it took to complete these legal formalities, did you form an opinion of the testatrix, the party whose signature you were witnessing, as to her mental capacity to

understand the nature of the paper she was signing? A I have.

Q State that opinion, if you will, please? A May I see the will, please? (Same was handed to the witness.) As I have stated to you before, as an attorney at the Bar here for over 23 years—

THE COURT: Now please just tell us what you observed about this particular person, Mr. Horowitz.

THE WITNESS: Yes, Your Honor. This person appeared to be jovial in her attitude. I could not see anything to indicate any force that her husband put upon her.

MR. McCANN: I move that be stricken.

THE WITNESS: Either by—

MR. DAVIS: The witness has the right to explain the reason for his opinion.

MR. McCANN: He isn't answering the question.

MR. DAVIS: If he wants to put the reason before the opinion, that is up to the witness. If you want him to give the opinion and then the reason, I don't see that it makes any difference.

THE COURT: I don't see that I do, either. The precise question is, what is your opinion regarding the mental capacity of this person to execute this paper writing as her last will and testament. That is it. What is your opinion. Then if you want to explain it, do it.

THE WITNESS: Yes, Your Honor. My opinion is that she was absolutely capable of executing this instrument.

* * * *

20 BY MR. DAVIS:

Q Did she appear to be capable of executing a valid deed or contract? A She appeared to be so.

Q Did you observe in the time you had her under observation in the presence of her husband, whether or not the husband used any undue influence upon her to obtain her signature to this paper?

* * * *

21 THE COURT: I don't know what the sense is
—used undue influence—exactly what you mean by
that. But you can certainly ask him what the hus-
band did, if anything, to bring about her signature to
the paper writing, if he saw him do anything.

BY MR. DAVIS:

Q Would you answer His Honor's question, Mr. Horowitz? A Yes. There was nothing to indicate anything that Mr. McClellan did that would lead me to believe that he used any type of force or pressure or intimidation or anything on Mrs. McClellan to compel her to sign that will. In fact, as I stated before, all of the parties seemed to be in more or less of a jovial mood.

* * * *

BY MR. DAVIS:

Q Was there any fraud, duress or coercion exercised in your presence by Mr. McClellan to obtain his wife's signature to that will?

* * * *

22 THE COURT: I think I will make the same ruling as about the other. Did you see or observe anything that indicated those things, in your presence?

THE WITNESS: None whatsoever, Your Honor.

* * * *

Cross Examination

BY MR. McCANN:

* * * *

23 Q (By Mr. McCann) When you were invited into the room, you were requested to sign two papers. Is that correct? A No, sir. I didn't know what I was wanted to come in for at first. I was asked to come in to witness a will, or wills.

Q All right. And altogether, you spent about five to ten minutes in there? A May have been five; may have

been six; may have been as long as ten; may have been only four minutes. Between five and ten, I would say.

Q Yes; it may have been only four minutes. And you, during that time, had the following things said while you were there: Mr. Malloy indicated that one instrument was the will of Mr. McClellan? A Not in the way you described it.

Q Didn't he state to you "This is Mr. McClellan's will"? A Not in the way you are saying it, sir.

Q Well, now, you have said that this was indicated, not by Mr. McClellan to you, but it was indicated by Mr. Malloy to you. A I said to you before I did not know whether Mr. McClellan's will was signed first, or Mrs. McClellan's will was signed first.

Q And I don't care, so let's get away from that. A All right. Assuming Mrs. McClellan's will was
24 signed first—

Q Yes. A —Mr. Malloy handed the will to Mrs. McClellan, or she already had it in her hand. He asked her whether that was her last will and testament, without respect to exact words, but words to that effect, and her answer was yes. And then he asked her whether she wanted Mr. Baker or myself to witness her signature, and she said yes. She signed her will and Mr. Baker and myself witnessed it.

And then simultaneously, that is, the next second, the same problem, the same question was asked Mr. McClellan, whether that was his last will and testament. He said yes. And whether he wanted Mr. Baker and myself to witness his will, and he said yes. And in the presence of all persons, the signatures were appended to the two wills.

. . . .

25 Q And Mrs. McClellan was rather an elderly woman, was she not? A I don't know what you mean by "elderly", sir.

Q Wasn't she in the sixties, wouldn't you say? A I don't think so, at that time.

Q You don't think so? A No, sir.

* * * *

THE WITNESS: I am not a judge of a person's age, sir. I couldn't answer you whether she was fifty or sixty, or even eighty. At that time I was never told her age.

BY MR. McCANN:

Q Describe her to the jury. What sort of looking woman was she? A As far as I can gather, she was a rather buxom woman, rather heavy.

Q How much would you say she weighed?

* * * *

26 THE WITNESS: I would say from my recollection that she was probably closer to 150 pounds than she would be to 120 pounds.

* * * *

BY MR. McCANN:

Q Now, will you tell us whether she was tall, or short? A She was taller than I am, to the best of my knowledge.

Q Did she have blue eyes or brown eyes, if you remember? A I couldn't tell you that.

* * * *

27 Q (By Mr. McCann) I want to ask whether you discussed any subject with her at all, other than the will. A To be perfectly frank, the joviality of the parties indicated that—what it was, I don't know.

Q The joviality of the parties—tell me of what that joviality consisted? A I can't answer you what it consisted of, but it was matters extraneous to the will.

Q Could it have been due to a drink or two before they got there? A No, sir—not to a drink.

Q You know that? A If it was, sir, I would never have witnessed that will.

Q Can you tell when a person has had one or two drinks? A As I explained to you before, on several occasions in my capacity as an attorney and as a notary public, I endeavor to observe the demeanor, especially of women, and if there is anything that comes to my attention that would indicate that I should not do anything in my official capacity, I will not do it.

Q I am not reflecting on you. I am asking you if the joviality could not have been due to a drink or two before coming down. A No, sir.

* * * *

28 THE WITNESS: I did not smell any whiskey, nor were there any indications to me that any of the parties in that room were under the influence of whiskey.

* * * *

Q While you were there, you were requested to sign this will? You were asked to sign this will at the request of Mr. Malloy? Is that correct?

MR. DAVIS: Just a minute. I object.

THE COURT: The witness has stated the circumstances, at least as to all he was asked, Mr. McCann.

MR. DAVIS: I don't believe it is entirely susceptible of that construction.

MR. McCANN: All right.

Q (By Mr. McCann) Now, at whose request were you asked to sign the will? A You mean to witness it.

Q Yes. At whose request were you asked to witness the will? A Mr. Malloy requested myself and Mr.

29 Baker to act as witnesses to the will.

Q All right. Now, did you see either Mr. McClellan or Mrs. McClellan read those instruments before they signed them?

MR. DAVIS: I object. It is immaterial.

THE COURT: No, the question is not immaterial. It is not necessary to the validity that he saw her do it, but he can certainly ask him if he saw them do it.

THE WITNESS: To the best of my recollection, I cannot say that Mr. McClellan or Mrs. McClellan read those wills. I would say that Mr. Malloy asked each one whether that was their last will and testament. I do believe that. I do believe that Mrs. McClellan did look at her will. That is the best of my recollection.

As a matter of fact, I was—you know, it comes to me little by little. It has been some years ago. And if I remember correctly, I think Mr. Malloy had a couch in his office at that time—I may be mistaken—and Mrs. McClellan was sitting on the couch at the time Mr. Baker and myself came into the office. See, Mr. Malloy's office was right next to mine, a few steps away. That is to the best of my recollection. I may be wrong she was sitting on a couch, but I think she was when Mr. Baker and I came in.

THE COURT: The question was, did she read the will in your presence. That is all we are asking now.

30 THE WITNESS: She looked at that will, sir.

BY MR. McCANN:

Q Did you observe if she had any physical impairment or disability at that time? A No, sir.

MR. DAVIS: I object.

THE WITNESS: She had none whatsoever.

. . . .

Redirect Examination

BY MR. DAVIS:

Q One question: You stated that Mr. Malloy asked you and Mr. Baker to act as witnesses. A Yes, sir.

Q Isn't that the usual thing any lawyer does when he draws a will for a client?

. . . .

31 MR. McCANN: My objection is that it is improper redirect.

THE COURT: Well, we are getting now into this witness's knowledge of what the custom and practice is with respect to inviting people in to witness wills. If he is familiar with that custom, I think I will let him answer it. I don't think it is improper to bring out whether or not he knows, because he was a witness to this will, whether or not that is the customary practice, for the drafting lawyer to invite somebody in to act as witnesses, or not.

Do you know whether that is the custom or not?

THE WITNESS: Yes, Your Honor, that is the custom, and in my business I have done it myself dozens and dozens of times.

BY MR. DAVIS:

Q After you have drawn a will at the request of a client, you go out and get two witnesses, do you
32 not? A Sometimes three.

Q You ask them if they will act as witnesses to a client's will? A Oh, yes, always.

Q After you and Mr. Baker had been asked by Mr. Malloy to act as attesting witnesses to his client's will, did anybody in his office—but it is a fact, is it not, that Mrs. McClellan herself then made the same request when Mr. Malloy said "Is this your last will?"

MR. McCANN: I object to this, on the ground that it is impeaching his own witness.

THE COURT: Not impeaching him, because I raised the question myself. The construction was not exactly what the witness said, but, after all, he is your witness, Mr. Davis. Don't lead him all over the place. Ask him whether or not this testatrix—or if he didn't state on direct examination, this witness, in reply to a question by Mr. Malloy, asked him to sign the will, she said she wanted him to sign the will?

BY MR. DAVIS:

Q Didn't you state on your direct examination, Mr. Horowitz, that Mrs. McClellan herself informed you this paper was her last will, and that she asked you to attest her signature?

* * * *

33 THE WITNESS: I don't believe it was done in that way.

* * * *

THE WITNESS: I don't recall whether Mrs. McClellan had the will in her hand at the instant, or whether Mr. Malloy gave it to her, but I know Mr. Malloy asked her if that was her last will and testament, and she said yes. And whether she wanted Mr. Baker and I to witness her signature to that will, and she said—

MR. DAVIS: That is exactly what I want.

THE WITNESS: She signed the will and Mr. Baker and I witnessed her signature to that will.

* * * *

34 *Thomas M. Baker*

* * * *

Direct Examination

BY MR. DAVIS:

Q Will you state your full name to His Honor and the members of the Jury, please? Your full name?

A Thomas M. Baker.

* * * *

Q What is your occupation? A Attorney-at-law.

Q You are a member of the District of Columbia Bar?

A Since 1910.

Q Since 1910? A Yes, sir.

Q Where do you maintain your office, Mr. Baker? A Columbian Building, 416 5th Street, Northwest.

Q Are you still located in that same building? A Yes, sir.

Q How long have you been in the Columbian Building in active practice? A Since 1910.

35 Q I show you this paper, Mr. Baker, which has been identified as Defendant's Exhibit No. 1, and ask you if you can identify the second signature on that paper. A Yes, sir.

Q Whose signature is that? A My signature.

Q Can you identify the first signature on that paper? A Yes, sir.

Q Whose signature is that? A Mr. Louis Horowitz.

Q Can you identify the signature on the front page of that paper, Anne G. McClellan? A Yes, sir.

Q Were all three of those signatures affixed to that paper on the same day and at the same place? A Yes, sir.

Q Will you state to His Honor and the members of the Jury, the circumstances under which you and Mr. Horowitz placed your signatures on this paper? A Mr. Malloy, the other attorney, for the plaintiff—for the testatrix on behalf of the will, rather, in this case—the caveatee here, came into my office and asked me if
36 I would step across the hall into his office to witness the signature—signatures of the lady whose name is affixed to this will and that of her husband to a somewhat corresponding will. And Mr. Horowitz was present in Mr. Malloy's office, and so was Mr. McClellan, the husband of the testatrix. And she was interrogated, I think by Mr. Malloy, who inquired of her what this paper was, and whether she had read it. She said yes, she understood it. "What is it?" "It is my last will and testament." "Do you want these gentlemen to witness the execution of this will by you?" "I do." And, thereupon, she affixed her signature. Mr. Horowitz then signed his name as an attesting witness, and so did I.

Q Now, I show you this second paper, Mr. Baker, which has been identified as Defendant's Exhibit No. 2 for identification, and ask you if you can identify the three signatures on that paper? A Yes, sir.

Q Whose signatures are they, sir? A Alfred D. McClellan, Louis Horowitz, and myself, as attesting witness.

Q And all three of those signatures were placed on this paper at the same place, and on the same day, as for Exhibit 1? A Yes, one following the other.

* * * *

37 Q Can you estimate the length of time it took to complete these legal formalities? A I should say not more than fifteen or twenty minutes.

Q Now, during that time, did you have occasion to talk to the testatrix, Anne G. McClellan? A I had.

Q And did you form any opinion at that time as to her testamentary capacity, or her knowledge of the instrument she was then executing? A Well, may I say this, that the circumstance of the execution of two wills at the same time was a little unusual for me, and I did engage myself in conversation with the lady. I found her to be a highly educated lady, and apparently of—well, her demeanor was as good as any lady I ever saw in my life, and I had no occasion whatsoever to think for a moment that she was anything otherwise than of sound and disposing mind and capable of making a will or deed, and understanding it.

Q Mr. Baker, during the time you were in Mr. Malloy's office for these legal formalities, did you notice Mr. McClellan, the husband, do anything to cause his wife to affix her signature to her will? A No, sir.

Q Did you observe him on any occasion use any
38 fraud, duress or coercion? A Certainly not.

Q To obtain her signature to No. 1? A His demeanor was that of any self-respecting husband.

MR. DAVIS: At this time, if the Court please, I offer in evidence Defendant's Exhibits Nos. 1 and 2.

* * * *

Cross Examination

BY MR. McCANN:

Q Mr. Baker, when did you first meet Mrs. McClellan?
A At the time of the execution of this will. That is the only occasion on which I ever saw her in my life.

Q Describe the lady to the Court. A Well, she was a mature lady, and rather large, one of agreeable manner.

* * * *

40 MR. DAVIS: I now offer these two exhibits, if the Court please.

* * * *

MR. McCANN: No objection, Your Honor.

THE COURT: Let them be admitted.

(Thereupon, Defendant's Exhibits Nos. 1 and 2, heretofore marked for identification, were received in evidence.)

* * * *

48 Mrs. Robert N. (Virginia M.) Newby

* * * *

Direct Examination

BY MR. McCANN:

Q Will you state your name and address? A I am Mrs. Robert N. Newby; 2706 East-West Highway, Chevy Chase, Maryland.

* * * *

Q (By Mr. McCann) Are you married, or single? A I am married.

Q How long have you been married? A Twenty-seven years.

Q Twenty-seven years? A Yes.

Q Do you have any family? A I do.

Q Will you name your children, and give their
49 ages? A I have one daughter, 24,—Mrs. Leonard Williams.

* * * *

A Mrs. Leonard Williams. And I have a daughter, 17—Jane.

* * * *

Q * * * Now, will you state the names of your parents? A Marshall Morgan, Senior, and Mrs. Anne McClellan, who is now dead, of course.

Q But she was Anne G. Morgan? A She was Anne G. Morgan.

Q Now, when and where were they married? A They were married in Nashville, Tennessee, in 1903, I believe December.

Q Where were you born? A I was born in Nashville, Tennessee.

Q What was your father doing there? A My father was a newspaper man. He was at one time editor of the Nashville Banner, and I believe another time editor of the Nashville Tennessean, and he was a member of the Press Club, president of the Press Club, I believe, for
50 three or four years. And that was his work primarily in Tennessee. And when he came up here, why, he came as Secretary to Senator Luke Lea. And he stayed there for a while in the Senate, and then he has had various Government jobs since that here in Washington, when we returned to live here for good. I was just a small child at the time.

Q Now, where did the family make its residence for most of the years that they were in Washington?

MR. DAVIS: If the Court please, I must object to all of this line of inquiry. I can't see the possible relevance to the issues in this case, going back now to the time when this witness's parents married, her father's early associations. We are concerned with the issue of November 1st, 1946.

THE COURT: Of course we are, Mr. Davis. I do not know that I see the materiality of it. I try to allow latitude to counsel if they believe it has some bearing on the case, providing it not be too extensive. Do you consider that to have some relation to the issues that we have here?

MR. McCANN: Very much so, and we are not going to take a long time on it.

THE COURT: Well, proceed, then, but if relevance is not shown, I shall have to strike it if motion is made for that.

MR. McCANN: Yes, sir.

THE COURT: The critical issue, of course, is
51 the testamentary capacity at this particular time,
and whether or not fraud or undue influence was exercised.

BY MR. McCANN:

Q Well, now, will you tell me at what time your father and mother moved to Klinge Road, if you know?

A The year was 1923, I believe 1923.

Q Now, will you tell me what part of your life was spent in your parents' home after coming as a little child to Washington? A Well, I spent 17 years before I was married there, and then when I was married I stayed there until my first child was born, which was three years later, and I moved for a year and a half away from my mother's home, while she was a little baby, and then I returned. When she went away to Europe to visit her sister, I returned, to take care of my father and my brother, and I stayed there for some (18) years, in either one house or the other before I moved away for good.

Q Now, will you describe your mother during the years when you were a child and a young woman? A Well, mother was—

MR. DAVIS: I object, if the Court please.

* * *

52 THE COURT: Of course it is impossible to just simply talk about the time the will was executed, if you are going into the matter of testamentary capacity. By the same token, we do not want to labor too much the background of things. Now, you were asking about her condition at the time this witness was a child.

* * *

MR. McCANN: Now, I just want her to describe the woman at that time, and I am going to ask about her habits; I am going to ask about friends; I am going to ask what sort of a wife she was, just get that picture, and then three or four questions to show the relationship at that time to the later relationship after the divorce. And then I will bring in, as I stated in my opening statement—

THE COURT: Do I understand what you expect to prove by this line of questioning is that this testatrix was quite normal—

MR. McCANN: Exactly.

THE COURT: In every respect, affectionate, and so forth?

MR. McCANN: Yes.

THE COURT: At that particular time?

53 MR. McCANN: Yes. That is all.

THE COURT: And then you are subsequently going to show—

MR. McCANN: After the divorce, and the trouble with her husband, that she took up alcohol and destroyed herself with alcohol.

THE COURT: When did she do that, by the way?

MR. McCANN: Well, they were separated in 1932, and divorced in 1934, and from 1934 to the time of her death, we are going to show she was an alcoholic.

THE COURT: By showing she was an alcoholic, you are going to show that her mental processes had deteriorated to the point where she did not know what she was doing, or did not have testamentary capacity?

MR. McCANN: At the time she made this will.

THE COURT: Mr. Davis, what comment do you make? Isn't that legitimate?

MR. DAVIS: No, Your Honor, I object as entirely too remote.

THE COURT: You don't mind showing she was in good shape at that time, do you?

MR. DAVIS: I will concede that, but I don't see that it has any possible relevance. We are consuming the time of the Court and the Jury in reviewing her entire history. The case should be narrowed to the issues at or about November 1, 1946.

THE COURT: Of course, that is the only issue before the Jury, but you are permitted, are you not, to show mental capacity, to take up previous conditions and any change that took place that might affect her capacity?

MR. DAVIS: I might say that in counsel's opening statement he said he intended to show that this decedent in 1932, some eighteen years ago, had been confined to an institution for alcoholism.

MR. McCANN: That is incorrect. I said that was in 1942.

MR. DAVIS: You also said 1932 and 1938.

MR. McCANN: I said she was separated from her husband then.

THE COURT: I have had will cases in which we have gone back into the childhood of the testator. I don't see how you can say as a matter of law that it has no bearing on it. It depends on what it is connected up with.

MR. DAVIS: May I cite your Honor the case of Labofish vs. Berman, 60 Appeals, D. C., page 400?

* * * *

THE COURT: I don't know. It may be connected up with her condition at the time she made the will. I cannot say as a matter of law it is not. I think I will permit the evidence. But don't labor it, please.

* * * *

55 Q Now, will you describe your mother during the years when you were a child and a young woman?"

THE WITNESS: Well, I guess the best way to describe her would be to say mother was always very happy and gay. She was pretty, and a charming hostess, and had a great many friends. And we had a very pleasant little average home, I would say. The children were happy, and we had a happy time when we were growing up.

BY MR. McCANN:

Q I believe you mentioned she was very popular during those years and had a host of friends? A She did.

Q What about her habits—were they good, or bad?

MR. DAVIS: I object.

THE COURT: I think I will sustain that objection. I do not think that relates to the point that you explained to me you were trying to show.

MR. McCANN: All right, sir.

* * * *

56 Q Now, will you tell us at what time, if any, there was any change in your mother? A Well, the first changes took place when mother had this unfortunate operation.

THE COURT: I am afraid I cannot understand you.

MR. McCANN: You will have to speak louder.

THE COURT: Talk louder, please, ma'am.

THE WITNESS: I say the first changes took place when she had a serious operation in 1932 and her nerves were more or less shot after that operation, and she began to be a little difficult at home, and she began to drink, and she and my father had a great many squabbles, and he left. He left her in 1932, and in 1934 he divorced her. And by 1934 my mother had begun to drink quite a bit, and she continued to drink quite a bit until, I would say, around 1940 she had become a complete alcoholic, and from then on out I would consider her a complete alcoholic.

MR. DAVIS: I move that be stricken, if the Court please, as expressing a medical opinion—she became a complete alcoholic.

THE COURT: Well, will you ask the witness what she means by the term? It may be a word of art. I don't know.

. . . .

THE COURT: What do you mean by using the term "alcoholic"?

57 THE WITNESS: I mean just that she was drinking constantly. In other words, most of every day and every evening, and that there were times in the morning when she would be sober, because a person does wake up sober, and then by ten o'clock or eleven, why, she had usually started on her day drinking. Would that make it clear?

THE COURT: I think that explains what she means by using that descriptive term.

MR. DAVIS: If the Court please, I know men who have the same habit, who start drinking at ten or eleven, and they are certainly not complete alcoholics, by any means.

THE COURT: I am not trying to settle the connotation of the term "alcoholic"—its medical connotation, but what this witness says is one way of stating it, and I think that is permissive, what she has said.

* * *

Q What about eating? By 1940, what were her habits with respect to eating and drinking? A Well, mother had an old friend who used to say to her: "Anne, you drink your meals."

MR. DAVIS: I object to any hearsay.

THE COURT: Yes. I think I cannot permit that.

THE WITNESS: I am sorry.

THE COURT: I know you are not familiar with the various rules of evidence, but one of them is that
58 you cannot state what somebody else told you.

THE WITNESS: Yes, sir.

* * *

THE WITNESS: I see. Well, I can say, then, to my own knowledge that I know that mother ate very, very little, and that frequently she would go for days without eating anything at times in her life, and I would take her trays, and she would just turn them down, and have highballs instead. That is as clear as I can make it.

* * *

Q Were you living in the home at that time? A Yes, sir.

Q Now, what happened in 1940 with respect to the attitude of your mother toward your husband? A Well, by then my mother had become, well, sort of at odds with different people that she would get an animosity toward, and one of them was my husband and my little girl.

Q Prior to the time when you were married originally, did your mother feel friendly, or did she evidence animosity toward your husband? A No, she never did.

Q What were her habits with respect to your husband prior to 1934, let us say? A Well, she had very friendly relations with my husband.

59 Q Did they do anything together? A We would have little card games together. and we

would play golf together, and little family jaunts, you know, things like that.

Q What about vacations? A Well, we would go on vacations together, to the seashore occasionally.

Q In 1934, you state she had developed this animosity toward your husband and your little girl? A That is correct.

Q By 1940, you stated that that was marked. Is that correct? A Yes. It was a marked thing by then, because she used to berate him to me. She would talk about him, call him, you know, unpleasant things.

Q Could you tell us what she called him to you? A Well, it is a little bit strong. She used to speak of him most of the time as a God-damn son-of-a-bitch, and a "bull-headed Dutchman"—things like that.

Q And what about this little girl of yours? Tell us what her attitude was to her? A Well, Jane used to sort of irritate her, and she would more or less pick at her, and some times she would go in and wake her up and tell her that she knew she didn't love her, and she just kept the child on edge most of the time
60 when she was a little girl.

Q What action, if any, did you and your husband take as the result of these things you have narrated in 1940? A Well, by then we were getting very worried about Jane, because she—her little nerves were just so shot that I was afraid the child was being influenced, you know, living in that atmosphere. And so it was brought out more clearly to me when the doctor came by one day and saw mother, and what did go on there in the house, and he said "You will have to get your children out of this house."

MR. DAVIS: I object.

THE COURT: Wait just a minute, now.

MR. DAVIS: His Honor has just corrected you, Mrs. Newby.

THE WITNESS: Oh, I am sorry.

THE COURT: You must not repeat what the doctor told you. You can say you consulted him, and as the result you did certain things, but not what he told you.

THE WITNESS: We also consulted a psychiatrist, my husband and I.

* * * *

61 Q Tell us what you and your husband did as the result of consultations with the doctor and the psychiatrist? A Well, after that advice, we moved. We bought a little house for eighty-seven fifty out on East-West Highway, and we set up our own little home.

* * * *

Q What did you do with your mother in 1940, 1941? A Well, I took mother out to a rest home on the Rockville Pike, by the name of Waverly, and I thought maybe if she got away from—

MR. DAVIS: I object to your thoughts, Mrs. Newby.

A (Continuing) I am so sorry. How will I say it? I wanted to get her away from alcohol for a while, and so I put her in there for, oh, maybe ten days, and brought her home.

* * * *

Q After that what did you do, if anything, with your mother, in 1942? A I took her over to Greenhill Institute on 16th Street, which is an institute for the care of alcoholics.

Q How long did she remain there? A She stayed for ten days, and they told me to—

* * * *

A (Continuing) I had to take her out because she wasn't cooperating. The doctor called me and asked me to remove her.

Q How did she demean herself thereafter? A I would say that mother just kept up her drinking all the time. She never stopped.

63 Q How often did you go to see your mother? A
I went every day, except perhaps on week-ends
after she married Mr. McClellan.

Q Well, I am speaking now from the time you left
the home. A Oh, I went every day.

Q Now, would you state what your observations were
with respect to your mother's memory? A Well,
mother, some days when I would go in to see mother, I
would talk to her—she stayed most of the time in the
bed—and I would stay and visit with her for a while,
and then I would go on about my own business, and go
to the store, and do my own little jobs. And in the after-
noon she would call me and she would say "Baby, why
didn't you come in today?". And I would say "Well,
mother, I was there." And she wouldn't remember it.
And her memory—she would tell me little anecdotes,
stories, and things, and then maybe ten minutes later
she would tell me the identical story, not having remem-
bered she had told it before. And she would misplace
little things,—and just the little things that showed that
her memory was partially gone.

Q Do you recall an incident in connection with eye-
glasses?

MR. DAVIS: If the Court please, I must object to
counsel continually leading.

64 THE COURT: Well, I don't know that that is
leading. He is asking, does she recall some inci-
dent relating to eyeglasses. It is awfully hard
to know what is or is not a leading question. That does
not suggest the answer, certainly. It does suggest and
call to her mind some incident that evidently they have
talked about. But a leading question, as I understand
it, is one that in some way suggests an answer. I think
I will let that one stand. But try not to lead the wit-
ness, Mr. McCann.

THE WITNESS: Well, Mr. McCann wanted me to
tell about the incident of mother's eye glasses. Well, I

found them in the ice box one morning when she couldn't find them. I guess that is what he had reference to.

• • • •

Q Could you tell us from 1941 until 1946 if your mother continued in the same line of habits that you have mentioned before? A Yes, sir. She did. I would say she did, if anything perhaps increased her drinking.

Q Now, I want to go back to the houses that you referred to as 3216-3218. Would you tell us which home your mother lived in? A She lived in 3216 until—

Q And who purchased that home? A Well, my father bought 3216.

65 Q Who purchased 3218? A My uncle, Mr. Leonard Horbury.

• • • •

66 Q Mrs. Newby, will you tell the Court and Jury the things you observed with respect to your mother's physical condition from 1934 to the time of her marriage to Mr. McClellan? Just describe the progressive observations which you made. A Well, mother developed alcoholic ataxia.

MR. DAVIS: Is that a physical condition, if the Court please?

THE COURT: What is that?

MR. McCANN: An alcoholic ataxia.

THE COURT: I don't know.

MR. DAVIS: I object to it—from 1934 to 1946
67 her physical condition. The issue is the mental condition of this decedent. If she had a broken leg, it would make no difference.

THE COURT: She could have had a broken leg without it in any way affecting her testamentary capacity. But at the same time, that does not mean he cannot show she had a broken leg.

MR. DAVIS: And no relevance to the issues of this trial,—that is my objection.

THE COURT: I am not sure its relevance has been made to appear, but I certainly don't think I ought to rule out the testimony if it does have some bearing on her mental condition. Go ahead. Try to use language that we understand, will you?

BY MR. McCANN:

Q Tell the Court and Jury what you mean by "ataxia"? A Well, ataxia is the nerves—the alcohol gets in the nerves and the system, and when the nerves begin to go, why, the legs begin to lose their capacity to walk in a steady gait. And mother developed also a liver condition which eventually turned into cirrhosis of the liver, and this was a slow process that took a great many years to come about, but it was a down-hill fight all the way on her physical condition.

Q How would you describe her stability on her feet? A At times, in the beginning, before this alcoholism had taken such complete hold of her, why, she could walk pretty well, but in the last years of her life, I would say in the last—oh, four or five years of her life—she seldom could go any place alone, and in the last four years of her life I don't think she ever did, because she was deathly afraid of stairs. She had several falls on the stairs, and she would never go out of the house unless Mr. McClellan would take her, or unless I would take her.

Q Do you recall at what time she began to experience the falls that you referred to? A I think one of the worst falls she had was when she fell down the steps, oh, maybe two years before she died. And then she fell in the living room one afternoon, and she couldn't get up, and she had to wait until he came home to get her off of the floor.

Q Well, do you know how many years she had been

in that condition where she did have falls? A I would say at least for four or five, maybe longer.

* * * *

69 Q Would you please state what you observed your mother do with respect to Jane?

* * * *

A Well, the main thing mother used to do with Jane that worried me so, was to go in and wake her up at night and fuss at her, and sometimes spank her. And she based it mainly on her calling me so often, because Jane was sick most of the time, and it just irritated her and got under her skin, and she used to just—

70 Q Let's get down to the time of the marriage to Mr. McClellan. When were they married? A They were married on October 19th, in 1946.

Q Were you there at the wedding? A I was.

Q Did you oppose the marriage? A No, sir. I didn't.

Q Why not? A Because I felt that mother had been a sad and lonely woman for a great many years, and that if she could get a little happiness out of marrying Mr. McClellan, why, I had no objection to her doing it. And I thought maybe if she did get some happiness and companionship, the mere fact that she was happy might make her drinking stop a little bit, and make her in much better condition.

Q What had happened to her friends since 1934? A All of her friends had about deserted her. Two ladies occasionally saw her, one of them oftener than the other. But there were about two left, I would say.

Q When did you hear about the will which was introduced in evidence here as being executed on the first of November,—the purported will? A I am not sure of the day, Mr. McCann. I think mother told me maybe a week or two or three days or something like that

afterwards. I only heard about it afterwards.

71 Q Did she make any statement as to the contents of the will? A Yes, she did.

Q What did she tell you? A She said she had left 3216 to me—that was the bigger house, the one that Mr. McClellan sold—and that she—

MR. DAVIS: Who sold it?

THE WITNESS: Pardon me?

MR. DAVIS: Who did you say sold it?

THE WITNESS: Mr. McClellan. Well, he engineered the sale.

MR. DAVIS: The evidence is, and the deed will show, Mrs. McClellan sold it.

THE COURT: Yes. Well, I—

THE WITNESS: I meant to say he negotiated it.

THE COURT: Let's not go into that. The question is, what about the will.

THE WITNESS: Yes, sir.

THE COURT: Or what you knew about the will.

THE WITNESS: Then she left 3218 to me, so she told me—to Mr. McClellan for his lifetime, and upon his death it was supposed to come to me. That is the way she explained it to me.

.

72 Q Right after the will was executed? A That is right. And she said "Is that fair, baby?" and I said "Yes, I think it is more than fair."

Q Now, then, when did you hear about the sale of the house known as 3216? A I didn't hear about it until after it was negotiated, and a maid that I had known since I was a little girl and had helped mother for a great many years, told me that she heard them talking about it when she was in there, and that the house was being sold.

Q Now, that was after the sale? A Yes, sir.

Q Which house was it that was sold? A 3216—the one that had been left to me.

Q Now, did you have any conversation after the death of your mother with Mr. McClellan, with respect to the will? A Yes, sir. I did. About ten days after mother's death, Mr. McClellan called me one evening and said that the will would be filed for probate, and that he wanted to know if I understood the terms of the will, and that it was his house for his lifetime, and upon his death that it was to go to me. And I said "Yes, Mac, that is the way I understood it." And that terminated the conversation.

Q Do you recall the day that your mother was
73 married? A Yes, sir. I do.

Q Prior to the wedding, did you see your mother prior to the wedding? A I did. I went in, and I helped mother get dressed for the wedding. I took her the blouse that she wore, and loaned her my hat.

Q What was she doing before the wedding? A Well, she had a highball going.

* * * *

A Well, mother, I would say, was in somewhat of a fog most of the time, because she was either getting ready to have a drink, she had just finished a drink, or she was asleep from the effects. And I used to see her early in the morning, because early in the morning was about the only time I could catch her when she was more like herself, because the rest of the time, why, she was drinking continually.

74 Q Do you have any idea when Mr. McClellan moved into your mother's home? A I am not real sure. I think it must have been a year and a half or two years before he married her.

Q Did you have any opportunity during that period, or during the period of their marriage, to observe what, if any, influence he exercised over your mother? A

Well, she always just did everything that he suggested, because I know lots of times when I didn't feel that she should be going any place, why, she would tell me that she was going with Mac to such and such a thing, maybe an office picnic or something, and she would say "I really would rather take a beating than go, but he wants me to go, so I am going." And they went to the beach several times, and I know two or three times I wondered if mother would make it, because she was in such poor physical condition when she left.

Q Do you recall any other trips, any other places he took her? A Well, they went to Atlantic City one time, and they went to Ocean City one time.

* * * *

75 THE COURT: I am interested to know when these events occurred that you have just related. Was that before or after her marriage?

THE WITNESS: They were after her marriage, the little trips that took place, most of them, I think.

* * * *

76 Q State the circumstances under which doctors were called to her home?

MR. DAVIS: It is an attempt indirectly to get in what the Court of Appeals has said in the Labofish case cannot be done.

THE COURT: She can tell what prompted her to call the doctors, but not what the doctors said.

MR. DAVIS: She has already tried to get in what the doctors said.

THE COURT: I did not so understand it. If so, I am willing to strike it. What was it the doctors said?

MR. DAVIS: My objection is based on the question of privileged relations between a patient and physician.

THE COURT: I sustain it. That is why I will not let her testify to anything the doctors said. But I thought you were objecting to that part of the answer

she made that at certain times her mother became unmanageable, and she called a doctor to give her a sedative. That doesn't violate any rule of privilege. It doesn't involve any hearsay. Read the question.

* * * *

77 THE WITNESS: I called—in the beginning of her alcoholism I didn't have to have a doctor for her regularly. I would call them when I needed them, and I used doctors more or less in the neighborhood that could be summoned quickly, because mother would be in hysterics, or she would be so I couldn't handle her. She would threaten to live the home in her nightgown. She didn't know what she was doing, and the doctor would come and give her a shot, or sedative, and she could sleep it off.

Then when I began to worry about her physical condition more, I would say it was in the '40's when I first started to put her in Greenhill. That didn't do any good, and I thought maybe a doctor would help her. So I took her to various doctors from then on out, to see if they could help her alcoholism.

BY MR. McCANN:

Q Name those doctors who attended her during that period? A There was a doctor, Sylvester—Dr. Bowen, Dr. Craighill, Dr. Huffman, Dr. Cassidy, and I don't know if there were any more.

Q Were these doctors all called by you? A Yes, sir.

Q To the home? A Yes, sir.

78 Q And for what purpose? A To treat mother's alcoholism, or her cirrhosis of the liver.

Q Will you tell what jewelry your mother had at the time she married Mr. McClellan?

MR. DAVIS: I object.

THE COURT: Step down a minute, and come to the Bench.

(Thereupon, Counsel and the Reporter approached the Bench, the Witness left the witness stand, and the following proceedings were had out of the hearing of the jury:)

MR. McCANN: The question, may it please the Court, is based upon the fact that shortly after the marriage of Mr. and Mrs. McClellan, Mr. McClellan sold a diamond ring of Mrs. McClellan's for some thirteen or fourteen hundred dollars. That is one of the pieces of evidence of his influence over her.

MR. DAVIS: I disagree with that entirely. Suppose he did? There is no evidence of influence, undue or otherwise. And it is certainly immaterial.

THE COURT: Of course anything that tends to show undue influence is admissible. Whether that standing alone would be admissible, I wouldn't say it was.

MR. McCANN: But it is just an incident, with a number of other incidents, that we feel are worthy of consideration, and should be interpreted by the jury.

79 THE COURT: How are you going to be able to show she did it because of the influence of the husband?

MR. McCANN: May it please the Court: This ring was given to her by her brother-in-law. She had promised it to her little girl when she was 21. After the marriage to Mr. McClellan, she sold this ring about two weeks before her 21st birthday. Mr. McClellan handled the sale. I think those facts are very important, shortly after the marriage, for a man to sell a diamond ring a woman had worn for many years—a valuable stone.

* * * *

THE COURT: I do not know the materiality of the question you have asked, but it may be material, and on that view I will let it be answered. It certainly is a matter that can be answered by cross-examination or testimony of other parties.

* * *

80 A Well, mother didn't have an awful lot of jewelry, but she did have one very large diamond ring that she had always cherished. Her brother-in-law had given it to her. And she had a beautiful diamond wrist watch, and some other small pieces of jewelry.

Q What disposition had she indicated she was going to make of the diamond ring, if any? A She had always told my oldest daughter that she would give it to her when she was 21 years old.

* * *

Q What became of the diamond ring after her marriage? A After her marriage, I went into the house one morning, and mother said that Mac had been home—Mr. McClellan. And I said “Well, what did he come home for?” And she said “Well, he had an errand to do downtown.” I said “What was it?”—

MR. DAVIS: I object, as the rankest kind of hearsay, as not in the presence of Mr. McClellan. He's in no position to deny or affirm it.

81 THE COURT: No, but statements made by the decedent are admissible.

MR. DAVIS: Not as against a third party.

THE COURT: No, but on the question of the mental status of the decedent it is, and it is relevant to any question of undue influence or fraud. That has been held time and time again, Mr. Davis.

MR. DAVIS: Can we fix the date of that conversation more definitely?

THE COURT: Yes.

THE WITNESS: Shall I go ahead?

BY MR. McCANN:

Q Yes, but tell us first what time it was, if you recall, approximately when it was? A It was fairly early in the morning. I would say around ten o'clock in the morning.

MR. DAVIS: What year and what month?

Q (By Mr. McCann) How long after the marriage, if you recall? A I think it was maybe a year or so, a year and a half. I am not sure of the date.

Q After the marriage? A After the marriage.

Q Now, proceed with the conversation. A And 82 it was—I can fix it a little better—it was just before, sometime near my daughter's 21st birthday. And I asked mother what he had come for. She said "He has taken my ring downtown to sell it."

Q Do you know what was received for the diamond ring? A I understand it was around thirteen hundred dollars.

THE COURT: What do you mean, you understand? Did she tell you?

THE WITNESS: Mother told me she thought that is what it was, around thirteen hundred dollars.

* * * *

Q Tell the Court and Jury whether or not your mother ever attempted to commit suicide? A She did, on several occasions.

83 MR. DAVIS: Will you fix the date of that, please?

* * * *

THE WITNESS: Well, it must have been back in 1938, around that time, and that was when I was living just in the house next door to her, I believe. And I had been over there to check on her, and I had gone home, and something just gave me a hunch to go back and see if mother was all right, because she had been very low and sad that day.

So I went back, and I found her in the kitchen, sort of half conscious, and she had all the doors and the windows and everything closed, and she had stuffed towels and things around the edges of the doors, and she had all the gas jets on, and I found her in that condition. Of course I was lucky enough to get there in time.

BY MR. McCANN:

Q Do you recall any other incident when she attempted, or claimed to have—when she attempted suicide? A Before she got to the place she couldn't drive a car, she would sometimes stalk out of the house, get in the car and say she was going to drive the car off the end of a (bridge). And she would disappear for a couple of hours, and I never knew whether she was going to carry it out or not.

84 Then she would call me in the middle of the night sometimes and she would say "I won't be here tomorrow when you come in. I am going to slit my arm"—and those things happened many times. Of course sometimes the next day she wouldn't even know she had called me. But it was due to the fact she was drinking so much, I guess.

MR. DAVIS: If the Court please, I move that answer be stricken in its entirety. Counsel's question was, was there any other attempt at suicide. There has been no mention of suicide, except she threatened to drive the car off a (bridge), she was going to cut her wrist, she might disappear for two or three hours.

THE COURT: I think myself the answer related to what might be termed threatened suicide.

* * * *

BY MR. McCANN:

Q Do you recall calling a doctor when you thought she had committed suicide? A One time I had to have a stomach man come in and pump her stomach out, because she had told me she had taken poison. Then after he brought the nurse and he pumped mother's stomach out—it was in the middle of the night—why, then she said she hadn't taken poison.

* * * *

85 MR. DAVIS: Will you give me the date of that incident, Mrs. Newby?

THE WITNESS: I am not sure of the date, Mr. Davis.

THE COURT: Can't you tell us approximately when these times were?

THE WITNESS: That was in the early part of her hospitalization, I suppose.

MR. DAVIS: Was that before or after the gas jet episode?

THE WITNESS: Oh, that was before.

MR. DAVIS: Prior to 1938, then?

THE WITNESS: Yes, sir.

* * * *

89 BY MR. McCANN:

Q Did your mother have any trouble with her eyes about 1947? A Yes, sir. She did. She had a cataract on one of her eyes, and it was operated on and removed around that time.

Q About 1947? A Yes, sir.

* * * *

90 BY MR. McCANN:

Q Will you tell what your mother did at times when she was under the influence of liquor? A Well, she would stand up and throw her arms back and roll her eyes back and her head around and say she was dying. Then she would twirl around and just fall on the floor, and sometimes she wouldn't answer me. I would say "Speak to me, mother" and she would just pretend she was gone. And it used to frighten my little girl an awful lot when she would see her in those kinds of conditions.

MR. DAVIS: Before leaving that, can you fix the date of that, Mr. McCann?

Q (By Mr. McCann) Did that happen on one occasion, or many occasions? A That happened on many occasions. I wouldn't be able to fix a date.

* * * *

91 MR. McCANN: Cross-examine.

MR. DAVIS: If the Court please, I move at this time to strike all of this witness's testimony of incidents she has narrated prior to November 1st, 1946, or prior to the marriage of her mother with Mr. McClellan.

THE COURT: Well, I will deny the motion for the reasons I stated at the time objections were made.

Cross Examination

BY MR. DAVIS:

Q How old are you, Mrs. Newby? A I am 45.

Q You have been married, you say, 27 years? A Yes, sir.

Q You were married at the age of 18, I take it? A Yes, sir.

Q That would be in 1924? A 1923. I had just turned 18.

Q You say your mother and father came from Nashville, Tennessee, to the District of Columbia? A Yes, sir.

92 Q In what year? A I am not real sure of the year. I was just a little girl, five or six, something like that.

Q Let's see. You were sure of it on your direct examination. I believe you told Mr. McCann your mother and father moved to the Klinge Road property in 1923. A Yes, they did, but we had been in Washington for some time before we moved there.

Q How long prior to 1923 had you been in Washington? A Well, I was 17 years old when we moved there, and I suppose—let's see—five from 7—about 12 years we had been in Washington.

Q You had been in the District then since about 1911? A Let's see. I had been in the District for twelve years.

Q And the same year your mother and father moved

to Klinge Road, 3216, that was 1923, was the same year you married? A That is correct.

Q Your mother had been an unhappy woman even during your father's married time, had she not? A No, sir; not until the few years preceding their divorce.

* * * *

93 Q I believe you said your father left your mother in 1932? A Yes, sir. That was my impression.

Q At that time they were living on Klinge Road? A Yes, sir.

Q Where were you and your husband living at that time? A When dad and mother separated, we were living there.

Q You were living there, too? A Yes.

Q And your father actually deserted your mother, did he not? A That is right.

94 Q Did he go back to Nashville, Tennessee? A No, he didn't go back. I think he kept his vote down there, you know, his residence, but he didn't go back to live.

Q But he had been residing in the District from 1911 or 1912, or thereabouts, until 1932, when he deserted your mother? A That is about right, I imagine.

Q Did he subsequently obtain a divorce? A He did.

Q In what jurisdiction did he obtain a divorce? A He obtained that in Tennessee, I believe.

* * * *

BY MR. DAVIS:

95 Q Had your mother done any drinking during her marriage with your father? A Not very much. They had quite a few little parties, and at the parties, why, they would usually serve a few highballs, but it was just social drinking at that time.

Q I believe you described her as rather a charming hostess? A She was.

Q The life of the party? A Well—

Q Had a host of friends? A She did have a host of friends.

Q Your father, being in Government service, did a lot of entertaining? A Yes.

Q Your mother was more or less his official hostess? A Yes.

Q She had been what you would term a social drinker all during her marriage to your father? A Not all during it, they didn't drink at all up to a point; you could say for several years before they were separated there was drinking.

Q Was your father required to pay your mother alimony as the result of this divorce? A No, sir. He gave her voluntary alimony of a hundred dollars a month.

96 Q Voluntary alimony? A Yes.

* * * *

Q Do you know whether or not your mother gave your father any cause to leave her in 1932? A Well, mother, as I told you before, was very difficult to handle after this operation. Her nerves went all to pieces, and my father didn't understand a lot of it, I don't think.

Q Which operation are you speaking of? A She had an operation in 1932—a female operation.

Q She was more or less of an invalid when your father deserted her? A No, she wasn't. It was mostly her nerves.

* * * *

97 MR. McCANN: May it please the Court: I do not wish to interrupt the cross-examination any more than is necessary, but I would like at this time if the Court would make known to the jury that the
98 question of whether or not Mr. Morgan deserted Mrs. Morgan is a legal question, and the fact that he went to Tennessee for a divorce is not desertion, but simply a separation.

THE COURT: I am not passing on whether it was or was not. But I do think the action of the court, rather than the opinion of this witness or counsel ought to be controlling. And, therefore, I will request counsel to use the term "separate" or "leave" rather than "desert".

BY MR. DAVIS:

Q Let's use your wording, Mrs. Newby. I believe your expression was that your father left your mother in 1932? A Yes, sir.

Q What month did he leave her in? A I am not sure.

Q Was it the spring or fall, summer or winter? A I am not sure of the month. There has been so much that went on, that I am a little hazy on some of those details.

Q What month in 1932 did your mother have this operation you have spoken of? A I thought it was in the spring.

Q In the spring? A Yes.

Q Can you fix that in mind, was it before or after the operation your father left your mother? A
99 It was after.

Q After? A That he left.

Q And that was some time in the year 1932? A Yes, sir.

Q Had there been friction between your father and mother prior to that operation A They had begun to squabble a bit, yes.

Q Had your father ever indicated he would like to be free and go his way without molestation from your mother? A No, I think he left really eventually because they had just failed to get along after this operation.

Q Are you familiar with your father's handwriting? A Yes, sir.

Q I take it you are familiar with your mother's handwriting also? A Yes.

Q Is this your father's name—Marshall Morgan? A That is right.

Q Is this his handwriting, this paragraph (showing document to witness)? A I think it is, although I can't see it very well.

Q Do you have your glasses? A No.

100 Q Would you care to use mine? A No.

Q Can you identify the first paragraph of that paper as your mother's handwriting? A That is mother's.

Q And the second paragraph, you said, looks like your father's? A That is right.

Q And do you know a man by the name of Harvey A. Jacobs, attorney in the National Press Building? A Yes.

* * * *

MR. DAVIS: I offer this in evidence, if the Court please, as Defendant's Exhibit No. 3.

* * * *

THE COURT: Let me read it. (The Court read the document.)

Oh, I think I will let it be admitted. We have gotten into this question of what the situation was respecting the separation of these parties. I do not think it is dispositive of this case by any manner or means, but since it has been gone into, I think I shall let this be admitted.

102 BY MR. DAVIS:

Q Now, having refreshed your memory, Mrs. Newby, do you still say it was in the spring of 1932 your mother had this operation? A I thought, I was under that impression, that it was.

Q On your direct examination, I believe you said it was after 1932 that your mother began to drink heavily? A That is correct.

Q Up to that time, she had been more or less a social drinker? A That is correct.

Q At that time did your mother have title to both of these properties on Klinge Road, 3216 and 3218? A I think she acquired 3218 from my uncle in 1932, which would have given her the title to it.

Q So she had title to both houses at the time your father left? A Oh, no, no. 3218 wasn't purchased until after he left, I don't believe.

Q I see. So in 1932, your mother only had the title to one house, 3216? A Yes, sir.

Q You and your husband lived in that house there at that time? A Yes.

103 Q At that time? A Yes, sir.

Q How long did you continue to live with your mother after your father left? A After my dad left, I continued to live there, either in 3216 or the other house, I think we were in the other house, just for a matter of two years—for about eighteen years until we left for good.

Q My question was in 3216, after your father left in 1932, how long did you continue to live with your mother, you and your husband? A For a period of eighteen years.

Q Eighteen years? A I think it was around that time.

Q Did you have any control over this drinking of your mother? A Not as much as I would have liked to have. It was very hard to keep her from drinking. I tried to the best of my ability.

Q You mentioned the names of some five doctors, all in the neighborhood, you say. A No, they weren't all in the neighborhood. Some of them were.

* * * *

104 Q So three of these doctors, at least, were neighborhood doctors, namely, Doctors Sylvester, Bowen, and Cassidy. Why did you think it was necessary to call in five different doctors? A Well, I would

need them. It was over a period of years, you understand. And one of those doctors, a Doctor Huffman, used to call on mother about three times a week, and would give her these Vitamin B shots. And she
 105 didn't seem to be getting very far with that treatment, and she got sort of tired of having the shots. So she said "Please don't call him any more, because I don't think that these—I am sick of the way he's giving me shots." She claimed he hurt her when he gave her the shots. So I said "All right, Mother, we will try somebody else." I mean, that is the way I usually got others.

Q Which one was the first you called in to take care of your mother for the alcoholism? A I think it was Dr. Bowen. I am not sure.

Q Didn't you think it might be wise to call in the same doctor each time, he being familiar with your mother's symptoms? A No, because they told me there was nothing they could do for her except to help her temporarily.

Q You say up to 1940, from 1932 to 1940, after she started this heavy drinking, she ate very little, and would go for days without food. Do you consider that fact alone, that is, that she went without food, as indicative of a lack of testamentary capacity some six years later? A Well, if anybody—I might put it this way, that she went without food, but she substituted alcohol.

Q You know that alcohol itself is a food, is it not?

A I never understood it that way.

106 Q Did you ever hear of Mahatma Ghandi? A Yes, sir.

Q Of India? A Yes, sir.

MR. McCANN: May it please the Court: I have heard a lot of him, but I have never heard of Mahatma Ghandi being mixed up in this, and I would ask, if the Court please, that we defer going into the subject of (Hinduhism).

MR. DAVIS: This is cross-examination and I want to bring out that Mahatma Ghandi went without food for some forty days, and without alcohol, incidentally, too, and never lost his mind. You know it to be a fact, don't you?

MR. McCANN: I still object. I think he might say Jesus also fasted for forty days, but it has no reference to this case. He didn't take whiskey during the forty days.

THE COURT: I do not think it makes much difference whether the witness is familiar with the fasting experience of Mahatma Ghandi or not. But I think if you want to assume that to be a matter of general knowledge, you can certainly argue it to the jury, Mr. Davis.

* * * *

107 Q When did your mother take this dislike you have spoken of against your husband? A Well, I would say that it was, oh, perhaps after she had been drinking for about ten or eleven years.

Q During the eighteen years you and your husband lived in one of these houses, did you and your husband ever pay your mother any rent for the house? A No, sir; because we took care of all bills and all repairs and all food, and expenses, and we carried the whole thing.

Q Did you have any roomers in addition to your own immediate family? A No, sir.

Q Was that because of any friction between your husband and your mother,—the fact that you were living more or less in your mother's house without any payment of any kind? A It wasn't at first, but as her irritability grew, she began to kick about it.

Q And that was long before her marriage to Mr. McClellan? A Yes.

Q Long before Mr. McClellan became a roomer at your mother's house at 3218? A That is correct.

Q You have said your mother—in one of the
 108 expressions you used—your mother called your
 husband a bull-headed Dutchman, did you not? A
 Yes, sir.

Q You yourself have referred to your mother as being
 bull-headed, have you not? A I have, on occasion.

* * * *

Q What do you mean by bullheaded, Mrs. Newby? A
 Well, it is sort of hard to analyze it. It just means that
 she was sort of hard to handle, and if she wanted her
 own way, why, she was determined to get it.

Q She was what? A I say if she wanted her own
 way, she was determined about getting it.

Q That is what you describe as a bullheaded
 109 person? A Well, just hard to reason with.

* * * *

Q Do you recall on March 21st your own counsel,
 Mr. Dorsey, asked you to describe the term "bullheaded"?
 He asked you as follows—page 61:

"Q Mrs. Newby, in describing a portion of your moth-
 er's temperament you referred to her as bull-headed.
 Would you, if you are able, explain and describe that
 portion of her character a little more fully?" Your an-
 swer was:

"A Well, it is just that Mother was—I would say she
 had a rather spoiled temperament, because, when she was
 young, she had been raised in a fashion that allowed her
 to do 'most anything she wanted to whenever she wanted
 to, and she would not use—she would not stand for any
 opposition on the part of the children, and we had always
 been raised with that sort of atmosphere, so that we
 just did not even try to cross her too much on anything
 because she would not permit being crossed and there was
 no reasoning with her. What she wanted to do, she
 went ahead and did it."

110 You recall so testifying on March 21st? A Yes,
 sir. I do.

Q So that on that occasion you felt her bullheadedness was due to the fact she would not take orders from her children, meaning you and your brother. Isn't that true? A Well, I suppose you could express it that way. I mean, I think perhaps you get the idea expressing it either way.

* * * *

111 Q Mrs. Newby, before recessing, at the point we left off, there is one question I had intended to ask you: After your father's divorce, did he ever remarry? A Yes, he did.

Q What year? A I think Dad married in 1934.

Q Your father remarried in 1934? A I think that is right.

* * * *

112 Q After your father left your mother, and before her marriage to Mr. McClellan, did she do any traveling? A She did go over to see her sister several times.

Q In England? A Yes, sir.

Q Did she ever do any traveling in the States? A She went out to the ranch in New Mexico—my uncle's ranch.

Q How long was she there? A I think several months, during the winter and early spring.

Q The winter of 1938-1939? A No, it didn't cover a year.

Q The winter of 1937-1938? A She perhaps went in the fall and came back in the early summer.

Q At that time, title to both of these houses were in her name—3216 and 3218 Klinge Road? A Yes, sir.

Q You and your family were living at 3216, were you not? A Yes, sir.

* * * *

113 Q During the time your mother was in New Mexico, were you living in the same house she was,

at that time? A I believe we were in 3216 at that time. I am not sure.

Q While your mother was away in New Mexico, did you correspond with her? A Yes, sir.

Q Did she correspond with you? A I would get a letter occasionally—very occasionally.

Q During that three or four months period? A Yes.

Q You did hear from her? A I did hear from her.

Q Do you have any of those letters with you now?

A No, sir. I don't.

Q Have you destroyed them? A I wouldn't
114 even have the vaguest idea where they were. They may be in the attic at home.

Q During that time, did your mother have a joint checking account with you at the Hamilton National Bank? A We never had an account at the Hamilton Bank. I had a joint account with mother at the Liberty National Bank.

Q Liberty National? A Yes.

* * * *

115 Q During your mother's absence from the city during that period in 1938 when she was in New Mexico, did your brother, Marshall Morgan, ever annoy or pester you for money from your mother's and your joint account? A I don't know if he did in that year. I can't remember whether he did in that year or not.

Q You can't remember? A No, sir, I am afraid not.

Q I will show you this envelope, Mrs. Newby, and ask you if you can identify the handwriting on the face of that? A That is mine.

Q I ask you if you can identify this letter (showing same to witness)? A (Witness examines letter) That is my writing.

Q It is your writing? A Yes, sir. Where did you dig that up?

Q Now, did your mother have any other designation for you, aside from Virginia? A Pardon me?

Q Did your mother ever call you any name
116 other than Virginia? A She always called me "Baby".

Q "Baby". Did you ever sign yourself or address your mother by any other name than Baby, or Virginia? A I don't believe so.

Q Did you ever sign your letters "Sis"? A I signed them "Sis" sometimes, if I was writing to them. Yes, sir.

Q And this letter I just asked you about, addressed to Valley Guest Ranch, Miami, New Mexico—that was where your mother was visiting in 1938? A Valley Home Ranch.

* * * *

118 Q Mrs. Newby, when your mother left for this trip to the ranch in New Mexico—which I believe you have already said was owned by an uncle of yours, is that right? A That is right.

Q What was her condition as to the chronic alcoholism that had been building up since 1932? Was she getting better, or worse in that respect? A I would say that she was getting worse all the time.

Q Getting worse all along? A It was just a progressive thing through the years.

Q During the three or four months she was down on this ranch, can you tell us approximately how many letters you wrote to her? A I don't recall, Mr. Davis. I am sorry.

Q Can you tell us approximately how many you
119 received from your mother? A I don't remember that, either.

Q In any of the letters you wrote to your mother, did you make any inquiry of her as to whether or not she was improving with respect to this condition of alcohol-

ism, or whether she had mended her ways, or anything like that? A I don't remember.

Q You don't remember? A No, sir. I don't. There have been so many things, it is hard for me to remember all the things.

MR. DAVIS: May I refresh the witness's memory by asking her to read the letter?

THE COURT: Yes, you may ask her to read that to herself.

Q (By Mr. Davis) Will you read that letter to yourself, which you have identified as yours, Mrs. Newby?

A (Witness reads letter, as requested by counsel.)

Q Have you fully read it? A Yes.

Q Having refreshed your memory, is there anything in this letter, in which you inquired as to your mother's condition as to alcoholism, and as to whether there was any improvement, or no improvement?

* * * *

120 THE WITNESS: I didn't refer to it in that letter, and I frequently didn't refer to mother's alcoholism, because it wasn't my wish to be denouncing her about it all the time.

BY MR. DAVIS:

Q I will show you a letter post-marked March 22nd, and ask you if that is in your handwriting, addressed to Mrs. Anne G. Morgan, Valley Home Ranch, New Mexico?

A Yes.

Q I will ask you if you can identify the handwriting of this letter? A Yes. That is my writing.

Q And you signed it "Sis"? A Yes.

Q Will you read that letter and refresh your memory, and tell us if there is any reference to your mother's alcoholism, her cure or non-cure in that letter? A (Witness reads letter.) O. K.

Q Is there any reference to that subject in that letter, Mrs. Newby? A No.

121 Q Now, I show you a letter dated May 17, 1938,

some two months later. Is that likewise in your handwriting? A Yes.

Q A one page letter signed "Sis". Is that your handwriting and your signature? A Yes.

Q Will you read that letter and tell us whether there is any reference to your mother's alcoholic condition, or recovery, or non-recovery from that vicious habit? A (Witness reads letter.)

Q Is there any such reference in that letter? A No, sir.

MR. DAVIS: I offer these three letters, if the Court please, at this time.

THE COURT: She said there was no reference in it.

MR. DAVIS: I think that goes—

THE COURT: Are there any references in it?

MR. DAVIS: None at all.

THE COURT: How would it impeach her, or become relevant?

MR. DAVIS: If her mother were down there for a cure, certainly (a doctor) would make some interrogation.

THE COURT: But she has testified she didn't,
122 so the introduction of the letter wouldn't impeach her.

MR. McCANN: May it please the Court: I want to take exception at this time to the statement he just made, that she was down there for a cure. There isn't one scintilla of testimony that she went there for a cure.

THE COURT: Well, there has been some evidence from which counsel made that inference. The jury will draw their own inferences.

MR. McCANN: I just want to keep a statement like that out of the record.

THE COURT: They will take their own recollection of the evidence and make their own inferences from it. I do not think counsel's allusion to that is particularly erroneous, because it is, as I say, for the jury to base its judgment on the evidence, and not what counsel charac-

terizes the evidence as. But I do not think, since it does not contradict the witness in any respect, it is relevant.

BY MR. DAVIS:

Q In any of your letters, Mrs. Newby, did you bring up the subject with your mother that Marshall, your brother, had been requested money from your joint account?

MR. McCANN: I object to that as irrelevant.

MR. DAVIS: I haven't finished the question.

THE COURT: Finish the question, and let me rule on it.

123 Q (By Mr. Davis) And that you were hoping your mother would retake her account in her own name and leave you out of it, so you wouldn't be annoyed by Marshall?

MR. McCANN: I object, Your Honor.

THE WITNESS: I didn't see that.

THE COURT: Well, that is exactly the same question I passed on a while ago. I do not see the relevance, but if counsel can show it is relevant, in some fashion, or connect it up, I will let the question be answered, and strike it if the relevance is not shown.

MR. DAVIS: I expect to show the relevance. It all bears on the question of competency, testamentary capacity. Your Honor has permitted the Caveator to go back to 1932.

THE COURT: Certainly, I have.

MR. DAVIS: I am up to 1938.

THE COURT: I am willing to let you go into anything that is germane to the issue. I am a little unable to see how that particular matter bears on the competency, but if you think you can show it does, I will let the question be asked and answered, and I will strike the answer if it is not shown to be relevant and germane.

* * * *

Q In this letter of March 22nd, 1938, Mrs. Newby, did you bring up the subject to your mother that Marshall had been annoying and pestering you for checks from your mother's account, and that you wished she would retake the account in her own name, so you would be relieved of all annoyance? A Is that in one of those letters? Because I say, where I said he wanted thirty more dollars—but I didn't read the part—

Q I direct your attention to the top of that paper. A (Witness reads letter.) Oh, I see. Yes.

Q You did bring up that subject and made that suggestion, did you not, to your mother? A Yes. That is in this letter.

* * * *

Q I show you this paper, Mrs. Newby, and ask you if you can identify the handwriting and signature on that? A Yes, that is mine.

Q And you can fix the date you wrote that? A It must have been when my little girl was very small. I don't know the date of it.

Q Well, fix the year, as approximately as you can. A Well, let's see. I wouldn't be able to fix it, unless you want to do a little simple arithmetic.

Q Which little girl are you talking about, the one now 17, or the one who is now 21? A Well, I have only two children. It says in here "complete charge of my two children" so it must have been when Jane, the little one, was a tiny little thing. I think it was just after my father left in 1932. No, wait a minute. It would have had to be when Jane was about maybe a year old, I guess. She was born in 1933. I don't know, Mr. Davis.

Q That refers to both of your children? A It says two children, so I guess she was here.

Q You only had two children? A That is right.

Q The youngest is now 17 years of age? A Yes

Q So it has been some time in the last 17 years. A Of course it would have to be.

MR. DAVIS: (Shows document to opposing counsel.) I offer this in evidence, if the Court please.

* * *

MR. McCANN: No objection.

THE COURT: Let it be admitted.

MR. DAVIS: Mark that Defendant's Exhibit 4, please.

(Thereupon, the document above referred to was received in evidence and marked Defendant's Exhibit No. 4.)

Q (By Mr. Davis) Referring to this Exhibit, 126 Mrs. Newby, Defendant's Exhibit No. 4, having read it, can you fix a little more definitely the occasion for your executing this paper? A I am afraid I can't, Mr. Davis. You ask me to recall so many things that have happened so many years ago, and there are so many things that have happened, that my memory is hazy on some of them.

* * *

Q At the time you executed this paper, your husband was still living, was he not? A Yes.

Q And he is still living, isn't he? A Yes.

Q You were married to him? A Yes.

Q Will you state to the Court and Jury why 127 you wanted your mother to have the complete supervision and entire charge of your two children in the event of your death? A Well, because I knew my husband had to be away a lot on his work, and I didn't want the children turned over to a perfect stranger. In case he married again, I would rather to have had my children raised by someone I loved. And at that time my mother wasn't a complete alcoholic. I had no way of predicting what she would become. She had started to drink, but she wasn't in a state of deterioration at that time.

Q You have already testified, Mrs. Newby, that in 1934 your mother was under the influence of alcoholic ataxia and that continued until her death. A She did not do that at times. I am trying to make you see the picture, that her alcoholism was progressive, Mr. Davis. You don't get to the complete stage of debilitation and deterioration that mother had gotten to in her last years, you don't accomplish that in a year or two or three or four. It takes a good many years of drinking to do that.

Q That is exactly my point. She was getting progressively worse, yet you felt your mother was competent enough to have complete supervision of your two children in the event of your death. A I say, Mr. Davis, she hadn't gotten to the point—

128 Q At what time? A At the time this letter must have been written. I had forgotten it existed. I presume when I had two children, there is seven years between them, it must have been when the little one was very small. She hadn't gotten to the place she was completely gone on alcohol.

Q It is manifest it was in the last seventeen years you wrote this. A It would have to be.

Q To fix this a little more definitely, you can't give us which year it was? A In the very early part of it, I am sure.

Q In the early part of the seventeen years? A Yes.

* * * *

Q Do you recall her having an accident in the
129 latter part of her life, in which she did break a leg? A Yes. She broke a leg in July of 1950, I believe.

* * * *

Q And how long prior to 1950, the date of the leg injury, did she have this cataract operation?

* * * *

A I think the cataract operation was—let's see—in 1947. I am not sure. Would you like me to check it?

* * * *

Q Now, on the occasion of both of these later injuries, the cataract operation and the leg injury, was it ever necessary for her to have the constant attendance
130 of nurses? A Yes, she had nurses after she came—

Q From 1947 on. A What are you dating it from?

Q From the time of the cataract operation in 1947. A Well, she only had a nurse for the operation, at the time the operation took place, and when she came home, she didn't have.

Q How long was she in the hospital for the cataract operation? A I would say two weeks, perhaps.

Q And did she have 24 hour nursing at that time? A For the first three days, I believe she did. After that, I think she only had a day nurse.

Q Did she have nurses when she came home? A No.

Q As the result of the leg injury in the summer of 1950, was she obliged to have nurses? A She didn't have a nurse. There was a woman who is a practical nurse, I guess you would call her, who took care of her after she came home. There were two of them. One stayed with her for about six weeks, I guess, and Mr. McClellan thought she was rather expensive, so he got one who didn't cost quite so much, and she was with her up to the time she died.

131 Q As the result of these late injuries and illnesses of your mother, did you ever volunteer to act as nurse on any occasion? A I went in to see mother every day, and helped the nurse do little things for her. I didn't take care of her, because I would have had to leave my home completely to give her 24 hour service.

Q On any occasion when you visited your mother, did

she ever ask you for something to relieve her pain? A Yes, she did.

Q Did she ever ask you to buy her whiskey? A Oh, yes.

Q Did you buy her whiskey? A No, because at that time, why, mother had gotten so far gone that I refused to ever get it for her any more.

Q What was the date of your mother's death? A It was on November 21st, 1950.

Q I show you this check, Mrs. Newby, dated October 7, 1950 (showing check to witness)— A Yes.

Q —with the notation in the lower left-hand corner, "2706 East-West Highway." Is that your address? A Yes.

Q Do you recall getting that check from your
132 mother and cashing it? A Well, this was a check, I think, that she gave me for one of the children's birthday presents. She gave them about five dollars every time they had a birthday, and Jane's birthday was coming up the next week.

Q I show you this check dated October 16, 1950 (showing check to witness), in the amount of five dollars, signed by your mother, also bearing in the lower left-hand corner the address "2706 East West Highway". A Frequently, mother wouldn't have any cash in the house because she—Mr. McClellan had told her not to write any checks, and when she needed a little cash she asked me to fill out the check for her, and then she would sign it. You notice I didn't sign either one of them.

Q What are the birthdays of your two children? A One of them is October 16th, and one is October 23rd.

Q Both in October? A Yes.

Q And you remember cashing these checks, do you not? A Yes—I don't know.

Q Did you buy a birthday present for your two children from your mother, then? A No, I only gave them the cash.

* * * *

133 MR. DAVIS: I offer these checks as Defendant's Exhibits 5 and 6.

THE COURT: Any objection?

MR. McCANN: No objection.

* * * *

134 Q What was your mother's physical condition on October 7, 1950 and October 16, 1950? A Well, I think I have told you, Mr. Davis, that mother's physical condition was to the place where she was an invalid, because she couldn't walk with a broken leg. She had been in bed since she broke her leg, and she was drinking a great deal.

Q Was she mentally unsound on October 7 and 16, 1950? A I have told you, Mr. Davis, that I considered mother mentally unsound, or in a mental fog, for a good many years. I have no way to put it right on the exact date of her mental foginess, but I know my mother was not herself for a good many, many years. That is all I can tell you.

135 Q Do you mean to have us believe you accepted these two checks while your mother was in a mental fog? A Listen,—people can write a check if they are not completely drunk. They can write a check early in the morning, and that is the time I always went to see her, because she wasn't drunk early in the morning, a great many times. There were other times when she was, but that was the one time of day when I knew I could talk with her and have a little social intercourse with her.

Q You have mentioned the fact, Mrs. Newby, that after 1932 all of your mother's friends deserted her. A That is about correct, with the exception of a couple of ladies maybe.

Q Will you give us the names of some of the friends who deserted your mother? A Well, mother hadn't had

any friends for so many years that I have a hard time recalling too many of them. There was a Mrs. Plummer, she used to play cards with; a Mrs. Young, a Mrs. (Breeding); a Mrs. McIntosh. And, let's see—Mrs. Taylor. They used to have little card games in the years before, and she would have maybe four ladies in a group in one afternoon, and four of another group, another, and they just took it turn about, you know.

Q Where does Mrs. Plummer live? A Mrs. Plummer lives out in Virginia, I believe.

136 Q What part of Virginia? A I don't know. I haven't seen the lady for years. This was years back, when she had friends.

Q Where does Mrs. Young live? A Mrs. Young lives over just off 34th Street, I think.

Q She still lives there, does she? A I think so.

Q Where does Mrs. (Breeding) live? A Right down a few doors from mother's house.

Q On Klinge Road? A Yes.

Q Does she still live there? A I think she does.

Q Where does Mrs. Taylor live? A Mrs. Taylor moved from Woodley Road some years back. I believe she lives in an apartment on Calvert Street. I am not sure.

Q At the present time? A I think so. I haven't seen those ladies for years.

Q Do you know Mrs. Lillian Yelverton? A Yes.

Q She was a friend of your mother's? A She was one of the ladies who kept up to some extent with mother, to some extent until she died.

137 Q To what extent? A Because she would go and see her. Mother couldn't get out, and Lillian would go and see her, and spend a night with her.

Q Mrs. Yelverton was one of the roomers at your mother's home? A Yes.

Q Before she married Mr. McClellan? A Yes. She was there when mother did marry Mr. McClellan.

* * * *

138 Q Mrs. Newby, I believe at the Noon recess I was about to go into the matter of your mother's second wedding, but before getting to that point, your direct testimony indicated that on two occasions, one in 1940, you took your mother to a rest home known as Waverly? A Yes, sir.

Q Where is Waverly located? A It is out on the Rockville Pike, just on the other side of the White Flint Golf Course.

139 Q Is that in Montgomery County, Maryland? A Yes, sir.

Q And you took her out there as the result of this chronic alcoholism you have been talking about? A Yes, sir.

Q How did you get her out to Waverly on that occasion? A Well, I just put her in the car and took her.

Q You drove her out? A Yes, sir.

Q Who accompanied you on that trip? A I think my oldest daughter went with me. I am not sure.

Q How old is she at this time? A She's 24 now.

Q And that was eleven years ago, so she would have been around thirteen then? A I believe—well, she must have been.

Q Was there anyone else on that trip, aside from your thirteen year old daughter, yourself and your mother? A I don't believe so.

Q Your husband didn't accompany you? A No.

Q Did your brother, Marshall Morgan, go with you? A No.

* * * *

140 Q I believe you said in 1942 you again took her to the Greenhill Institute? A Yes, sir.

Q Where is that? A That is over on 16th Street, just north of Irving, I believe.

Q That is in the District of Columbia? A That is. Yes, sir.

Q Did you drive her over there? A Yes, sir.

Q Who accompanied you and your mother on that trip? A I don't know whether I had anybody with me or not. I don't recall. I think I took her by myself. I am not sure.

* * *

Q Both of these places are private institutions, are they not? A Yes, sir.

Q Your mother went into them as a voluntary patient?

A Yes. I more or less persuaded her to try it,
141 hoping it would do her some good.

Q She was not committed there on the certificate of one or more physicians? A No, I think the doctor from Greenhill Institute came out one night when she had, I guess you would call it DT's, or hysteria, or something, and he recommended that it would be a good thing for her to try.

Q And she indicated her willingness to make the attempt? A Yes, after I talked to her and persuaded her.

Q And she remained at each of these institutions a period of ten days, on each occasion? A I know it was about ten at Greenhill. I am not sure whether it was ten days or two weeks at the other.

Q Your testimony is neither of these cures had any effect whatever on your mother, she continued her alcoholic ways up to the time of her death? A That is my impression.

Q At that time she was the title owner of two pieces of real estate in the city? A Yes, sir.

Q According to your statement, some little jewelry?

A Yes.

Q And she was still a single person, a grass widow, so-to-speak? A Yes.

142 Q She wasn't married to Mr. McClellan then?

A Not when I took her to these institutions.

Q In 1942, she was still a grass widow? A Oh, yes.

Q Did you or your brother make any attempt to have a conservator appointed for her estate, or have her committed as of unsound mind? A I talked to a friend of mine who was an attorney after she was married to Mr. McClellan.

Q I am asking you about 1940 and 1942. She wasn't married to Mr. McClellan until 1946. A No, no, we didn't want mother committed. I couldn't have done that to mother. She wasn't insane. She was just an alcoholic that was in a daze, that is all, and in a mental fog, and you couldn't call anybody insane that was in that condition.

Q Do you mean she was not insane? A No.

Q Outside of these occasions when she was in a mental daze, she was otherwise a normal female, was she not? A I wouldn't say she was normal to any extent. I am not supposed to give an opinion, because I am not a doctor, but water accumulates around the brain when a person has had enough to drink over a period of time, they get what they call water on the brain, and I know mother had that.

143 Q Now, after your mother returned from Greenhill Institute, when did she start taking roomers in the house at 3216 Klinge Road? A Well, I think she had—she had roomers from the time that my husband and I were forced to leave. That was in 1941.

Q Mrs. Newby, what did you mean just now when you said you and your husband were forced to move in 1941? A Well, we weren't actually forced. We were forced because we had no other choice in the matter about the children. I couldn't leave the children there any longer after that time, because I had the doctor's advice to get the children out of the house, that it was no place for them to be.

Q From that time on, 1941, your mother had roomers in that house? A Yes.

Q Do you know a Mrs. Yelverton, a Mrs. Lillian Yelverton? A Yes, I do, very well.

Q Did you—do you know when she started to room at your mother's home? A She was there when we left.

Q Do you know how long Mrs. Yelverton had been at your mother's, as a roomer, up to the time of your
144 mother's second marriage? A Lillie had been there for, I will say two or three years. Then she went back to her own apartment and didn't return to my mother's house.

Q She was not a gratuitous guest? A No.

Q She paid her room rent? A Yes.

Q She boarded there with your mother? A Yes.

Q Do you know what rate she was paying your mother? A I am not sure. It was something like sixty dollars a month.

Q Hadn't it been some lesser amount, and your mother raised it to sixty dollars a month? A I don't recall.

* * * *

Q * * * Do you know any other roomers at your mother's home besides Mrs. Yelverton? A She had a Mr. Frank Leland there at one time. He was a Philadelphia boy. My cousin, Louis Griffin, was there for a while.

I declare, I just don't remember any more.

145 Q I believe you said Mr. McClellan became a roomer two years before he married your mother?

A I am not sure of the time Mr. McClellan was there. It was something like a year and a half, two years.

Q Your mother fixed the amount of rental to be paid by each roomer? A I never bothered about those transactions between the roomers and mother. There was just a friendly agreement between them, and they never had any contracts of any kind. They just gave the money when it was due, I suppose.

Q You don't mean these roomers gave your mother whatever they felt like giving her? Didn't she fix the

amount? A They had a certain agreement about the amount.

Q Your mother collected the monthly rents? A They would give it to her when it was due.

Q She was competent to make those contracts, was she not? A There was no contract made. There was just a friendly agreement.

Q Getting down to October 19th, 1946, which was the date of your mother's marriage— A Yes, sir.

Q Mr. McClellan was living at the home at that time as a roomer, was he not? A Yes, sir.

146 Q What time of the day was that marriage ceremony? A I think it was in the early afternoon, if I recall correctly.

Q And was it at Reverend Hurst's home, or at the church? A It was at the little church.

Q At the church? A Yes.

Q I believe you said you loaned your mother for the occasion a hat and a pair of gloves, is that right? A No, I said I bought her a blouse she wore with her suit, and I loaned her my hat.

Q You loaned her your hat. Were you helping her with the preparations for the wedding during the morning? A Before she got married, I went in there to help. I don't know exactly what time I got there.

Q On the morning of October 19th, 1946? A I can't place the time exactly, because I went in there in plenty of time to get her dressed before the wedding.

Q Can you approximate the time you went to your mother's home that morning for the purpose of helping her? A I would say at least an hour and a half before she was married.

Q She was married at two or two-thirty in the
147 afternoon? A It was in the early afternoon.

Q It was some time after noon when you arrived at your mother's home? A It could have been.

Q All preparations for the wedding had already been made? A I guess Mr. McClellan had made those.

Q Where was Mr. McClellan at the time you arrived at the home? A I believe he was downstairs waiting. I am not sure.

Q I believe you said in response to a question from Mr. McCann, that you fixed your mother a highball? A I did not say that.

Q You saw her have one highball? A I said when I got there she had a highball in her hand.

Q Do you know who fixed that? A I guess Mr. McClellan did.

Q Did you see him fix it? A No, I didn't.

Q Did she have more than one highball from the time you arrived until the wedding? A No, because I remember telling her I didn't think she had better have any more before she went up there.

148 Q So she only had one from the time you arrived there until the wedding ceremony? A To my knowledge.

Q Was your mother under the influence of intoxicants at the time of the wedding? A She had had a drink. I wouldn't call her drunk, but I saw her having the drink. I don't know how many more she had before I got there.

Q Did she understand the nature of the wedding ceremony? A She seemed rather pleased with it, she was going to make the whole thing legal, is the way she expressed it to me.

Q Was she able to make the proper responses to Reverend Hurst? A Yes, I think so.

Q Did she need to be supported? A Well, Mr. McClellan had to help her out of the house and up the steps, and she had a definite ataxia when she went into the church. She didn't stagger, but she had a very feeble way of walking.

Q Would you say she was under the influence of intoxicants at the time of that ceremony? A I couldn't

say one way or the other, because I am not a doctor. I
 couldn't say she was completely drunk, because I
 149 don't think she was.

Q Do you recall your deposition on March 21st
 of this year? A Yes.

Q Do you recall testifying on that occasion as follows
 —page 59 of the record: (Reads, as follows:)

“Q And you say she was under the influence of in-
 toxicants at that time?

“A I do not know how much she was under the in-
 fluence; I am sure she must have had one or two drinks
 when she went, because she was barely able to stand up.
 My daughter was with me.”

Do you recall testifying to that effect? A Yes, I do.

Q It is your testimony she was barely able to stand
 up at the time of the wedding? A That is correct, Mr.
 Davis, because when mother did stand up for any length
 of time, she got very wobbly. She was very weak.

Q Who else was present at this wedding ceremony?

A I think Mrs. Yelverton, but I wouldn't recall particu-
 larly. I believe she was there, because she was living
 at the house at the time.

Q Anybody else? A Well, the preacher, and
 150 I don't know whether his wife was there or not. I
 don't remember.

Q That has only been a little over four and a half
 years ago, Mrs. Newby.

* * * *

THE WITNESS: I will tell you, Judge. It was such
 a pitiful little occasion to me that I really didn't pay too
 much attention. I sort of lived through it, so-to-speak,
 you know.

* * * *

Q Have you refreshed your memory since March 21,
 1951 on that subject, as to who was present? A Have
 I refreshed my memory?

Q | Yes. A I think I asked my daughter whether she remembered—

Q | Which daughter are you referring to? A The one that attended the ceremony.

Q The older or younger of the two? A It was the older girl who went with me.

151 Q Do you recall testifying on March 21st, page 60 of the record, about the middle of the page:

(Reads:)

“Q And the only witnesses were your daughter, yourself, and the preacher?

“A That is right.”

A Well, I guess I just didn't remember. I am sorry.

Q You do recall now Mrs. Yelverton was present? A Yes, because Anne reminded me she was.

Q Do you recall a man by the name of Newton being present? A No, I don't.

Q Excuse me. I had the wrong name. Mr. Dixon. Do you recall Mr. Dixon being present at that wedding?

A No, I don't believe I remember Mr. Dixon being there. He may have been there when we came home.

Q Now, having been through the wedding ceremony itself, you are familiar with the exact words passed and the wedding ceremony, are you not? A Yes, sir.

Q Do you recall the portion of the ceremony when Rev. Hurst asked if anyone present knew of any reason why this man and woman should not be joined in matrimony? A Yes, sir.

Q Did you make any response to that question? A No. I had no objection to mother marrying Mr. 152 McClellan. I had no reason to believe he had any ulterior motives at that time. I thought maybe he might make her happy, and she had been sad and lonely for a long time, and I wanted to see her happy.

Q You testified in your deposition your mother was under the influence of intoxicants at the time. A Even

if she had been, I would never have objected if it would have made her happy to marry again.

Q Don't you consider marriage a form of contract?

A Yes, sir. I do.

Q Between two human beings— A Yes, sir.

Q To which the ultimate consent is necessary? A Yes, sir.

Q Yet you made no objection when Rev. Hurst asked if anyone present knew of any reason why these two should not be married? A No, because I wanted mother to be happy. That was always what was in the back of my mind, that she had been lonesome for such a long time that she deserved a little happiness.

Q At the time she married Mr. McClellan, and from then on, was she happier than she had been for a number of years?

* * * *

153 THE WITNESS: Those were the years she was very happy, you say?

Q (By Mr. Davis) Yes. A Well, I think she was right proud of the fact she was married again, because my father had remarried and she had been a widow for so long, I think it used to embarrass her that she hadn't married again, and she was pleased to think that she would receive that status of being a married woman. Does that answer that question?

Q So the last four and a half years of her life, up to the time of her death last November— A Well, at times, Mr. Davis—I will have to qualify that—because during the latter part of the four years of her marriage to Mr. McClellan, why, she was rather unhappy, because it had been his habit to always stay home on the week-ends with her, and after mother broke her leg, why, he didn't do that at all times, and she used to worry, and say, cry, say "Where is Mac" "Where is Mac?".

154 And I would say "Well, Mother, he will be home soon. Don't worry about him."

And he got a little fed up, I think, with Mother being an invalid, and having a broken leg, and he just decided that, I guess, his Saturdays should be his own, so he didn't stay around there. And she stepped up her drinking at that time, and that last stepping up, just previous to the time she died, was what really killed her, because her organs stopped functioning. They simply couldn't take any more alcohol, and she died because her kidneys stopped functioning.

Q Are you finished? A Yes, sir.

Q After your mother was married to Mr. McClellan in October, 1946, did you ever visit your mother in the evening? A Occasionally, but not very often. I would be in there some time late in the afternoon. Sometimes I would pick up Jane, and we would go by there and stay for a while.

Q In the afternoon? A Yes, sir. But not very often. It was usually in the morning when I was there.

Q When Mr. McCellan was at work? A Yes, sir.

Q Did you ever visit your mother over a week-end, Saturday and Sunday? A Yes, sir.

155 Q How often after 1946? A Not too often, because I avoided the place on week-ends, because usually they were both pretty well drunk in the week-end, and I didn't think it was a very good idea to go in there then. I don't think they wanted me there then.

Q After 1946, did you ever invite your mother to your home? A I never invited Mr. McClellan or mother after she married Mr. McClellan. I had her to lunch. I used to go and get her and bring her to lunch sometimes when she was able to go out, but it wasn't very often.

Q I believe you have told Mr. McCann, with reference to your mother's will, Exhibit No. 1, that you knew of the execution of this paper within two or three days after it was signed by your mother? A I am not sure if it was two or three days or a week. But she told me

after it was drawn up. I didn't know of it before it was drawn up.

Q Didn't you testify on March 21st that you knew it on November 3rd, two days after the execution of the will? A Maybe I did say two days. I couldn't put the exact day on it. But she told me several days or a week afterwards.

Q Your mother told you at that time, when she told you of the execution of the will, and the contents, 156 that she had left you 3216 Klinge Road, Northwest? A Yes, sir.

* * * *

157 THE WITNESS: And she also said that the house at 3218, which is where they lived, was to be left to Mr. McClellan for his lifetime, and upon his death it was to go to me. And then she said "Do you think that is fair, Baby?". I said "Yes, I think it is more than fair, Mother."

BY MR. DAVIS:

Q Didn't she tell you Mr. McClellan had executed his will on the same date? A I had no knowledge of that at all.

Q You had no knowledge of that at all? A She never mentioned it.

Q I direct your attention to Item 2 of Mr. McClellan's will: (Reads)

"I give, devise and bequeath unto Virginia M. Newby, my stepdaughter, premises 3218 Klinge Road, N. W., Washington, D. C., in the event title to said premises are in my name at the time of my death."

158 Isn't that exactly what your mother told you? A No, she never—

Q Let me finish the question. A I am sorry.

Q —that she had left 3218 to McClellan, and that he in turn had executed a will leaving that house to you?

A No, sir. The only way she explained it is the way I told you.

Q At any rate, you did tell your mother, after finding out she had executed a will on November 1st, 1946, approximately two days later, that you felt it was fair?

A Yes, I did, as it stood then.

Q You felt if she made a will on November 1st, 1946, from what she said it contained, that she was perfectly competent to do so, didn't you? A Well, there was nothing I could do about it after it was done, and I never did pester Mother about things I couldn't help.

Q If she made a will along the line you are telling us now she indicated the will was, didn't you feel she was perfectly competent to make such a will?

MR. McCANN: Just a minute.

THE WITNESS: I felt she was led into it.

* * * *

160 BY MR. DAVIS:

Q I show you your mother's will, Mrs. Newby,
161 and direct your attention to Item 1, in which it states:

"I give, devise, and bequeath unto my daughter, Virginia M. Newby, of Chevy Chase, Maryland, my certain real estate located at 3216 Klinge Road, N. W., Washington, D. C., absolutely and in fee simple."

That is exactly what your mother told you two days after she had done it, isn't it? A Yes.

Q She had left you 3216 Klinge Road, absolutely and in fee simple? A She didn't express it that way. She just expressed it the way I told you before, Mr. Davis, that she had left 3216 to me completely, in fee simple, or whatever you call it; that she had left 3218 to Mr. McClellan for his lifetime, and that upon his death it was to go to me. And then she said "Do you think that is fair Virginia" or "Baby?". I said "Yes, Mother, I think that is more than fair." Of course Mr. McClellan sold my equity in 3216.

Q Mr. McClellan sold your equity in 3216?

THE COURT: Let's not get into that phase right now, because that is not responsive to the question.

THE WITNESS: I am sorry, Judge.

* * * *

162 Q After your mother's will had been drawn along the lines you have just indicated she told you it was, that was perfectly all right with you, was it not?

A There was nothing I could do about it one way or the other, Mr. Davis, whether it was all right or not.

Q Didn't you tell her "That is more than fair."? A Yes, I did.

* * * *

163 Q Now, you have testified as to what your mother told you of the contents of her will two days after she made it, and in your opinion what your mother told you was to your way of thinking more than fair? A Yes, sir.

* * * *

Q Do you think your mother was competent to make a will on November 1st, 1946, regardless of what she told you? A No, I don't, Mr. Davis. I don't think so at all.

THE COURT: You might ask her even this, because I don't want to rule you out on anything that is proper: You might ask her if she thought she was competent to make that kind of disposition of property which she said she had made. I think that is all right.

BY MR. DAVIS:

Q Do you understand His Honor's question? A I thought you were going to ask me—I am sorry.

Q No. You have read this will of your mother, have you not? A No, I have never seen the real will.

Q Look at it. You have seen a photostat of it through your counsel, have you not? A (Witness reads will.)

Q Now, have you read all five items of the will? A I think so.

Q You are thoroughly familiar with it? A Maybe not thoroughly, but I glanced at it.

Q Would you state your mother was competent on November 1st, 1946 to make that disposition of her property? A No, sir. I don't think so.

Q Why not? A Because, I told you, Mr. Davis, I didn't think mother was herself in any sense of
165 the word for a good many years before she married Mr. McClellan, because she had changed in character, the way she acted. She wasn't even the same personality. Mother used to be very alert mentally. She used to take care of her own business. And when she married Mr. McClellan, she didn't take care of anything, he took care of it all, and she was perfectly willing to sit back and let somebody else have the responsibility.

Q That is the basis for your belief that she wasn't competent to make any will on November 1st, 1946? A That is correct.

Q In other words, if this will had left everything to you, and it had been a thoroughly favorable will, you would have regarded her as competent? A No, sir. I wouldn't have.

Q If she had completely disinherited you, you would have felt the same? A I still would have felt she was incompetent, any way you look at it, to make any contract.

Q After you told her what you did, that the disposition she had indicated in her will was more than fair, did you ever ask her who drew her will? A I didn't ask her anything about it. I knew there was no point in going into it after it was done, because I am inclined to let anything go I know I can't do anything about. I
try to forget about it and go ahead to the next
166 thing that comes up.

Q Did there come a time in 1948 when you were advised your mother had sold 3216 Klinge Road, North-

west? A I was never advised she had sold it. I learned it accidentally.

Q From whom did you learn it? A From the maid who was working there, who had been—well, she had been a maid for a lot of friends of mine, and she had also been a maid for us on many occasions since I was a little girl.

Q What is her name? A Her name is Mary Semley, I believe she spells it.

Q Where does she live? A She lives with me.

Q She's your maid? A No, she is not my maid. I give her a home. She does what they call day work. She has a little room in the basement.

Q She's still in your home? A She has been with me for some years.

Q She has been with you since the death of your mother? A She has been with me since long before mother died, at least three years before she died.

Q It was through Mary Semley you learned your mother had sold 3216. Do you know the name of
167 the realty firm who handled that deal for your mother? A No, I don't. I know the name of the real estate agent that handled it.

Q What is his name? A His name is Newton Jeffress.

. . . .

Q Did you learn the exact date of the sale of 3216 Klinge Road? A No. I don't know the exact date. I think it was in March, 1948.

Q How soon after March, 1948 did you learn
168 from Mary Semley that it had been sold? A

Mary came out to the house—oh, she had heard a discussion there between Mr. McClellan and Newty about the sale of the house.

Q The question was how long after March, 1948 was it you found out? A That is what I was going to tell you. And then Mary came out to the house, and she said

"You know, Miss Virginia, you know Mr. McClellan is going to sell your mother's house."

Q Well, now, just a minute. Let's clear this up once and for all. You know Mr. McClellan couldn't sell your mother's house, don't you? A I knew he would have to have mother sign the papers.

Q You knew he had absolutely no interest in that house? You know he wouldn't have to sign a deed, don't you? A I know that mother would never—

MR. McCANN: May it please the Court, we object to these questions as argumentative.

THE COURT: Well, I think they are, but at the same time, the witness said that Mr. McClellan sold the house, and that is why counsel is interrogating her. She didn't mean that, I don't think—did you?

THE WITNESS: I just meant that he helped negotiate.

* * * *

169 Q Mrs. Newby, I believe you said you first learned of the proposed sale of 3216 Klinge Road in March of 1948. Is that right? A Yes, sir.

Q You learned it from this Mary Semley, who is now your maid? A Yes, sir.

Q Now, did you ascertain then that it was Mr. Newton Jeffress who had handled this sale? A Mary told me that Newty was in there.

* * * *

Q How long had you known him? A Oh, I had known Newty, oh, since he was in his early twenties. He was a friend of my brother.

Q How old is he now? A I imagine Newty
170 is in his early forties—around forty-one.

Q You have known him about twenty years? A Yes, sir.

Q How soon after you learned of the proposed sale of 3216 was it you talked to Mr. Jeffress? A I called

Newty up and talked to him. I don't know just how long it was afterwards. And I told him that—

Q I don't want your conversation. I am just asking you how soon after you learned of the sale was it that you talked to Mr. Jeffress. A I must have called him within the next day or so.

* * * *

Q Do you know the date of the settlement of this sale at the title company? A I think it was some time in April, wasn't it?

Q In April. To be exact, it was April 8th. A Was it?

Q Now, did you do anything with reference to stopping the sale of that property? A I tried to stop the sale of it. I had my husband talk to some friends of his who were lawyers, and we found that it was too late at the time to stop the sale of it, and so it just had to go through.

171 Q This was some time in March of 1948? A I guess it was.

Q And prior to the actual settlement at the title company on April 8th? A And when we looked into it, I remember two men my husband talked to, that happened to be lawyer friends of his, told him that it was too late to do anything about it. And I believe Newty told me it was too late, too. So we had to just let the sale go through.

Q Did you feel your mother on April 8th, 1948 was incompetent to execute a deed to that property? A I think, Mr. Davis, I may merely declare to you, as I did before, that I felt mother was incompetent to handle any of her affairs herself.

Q Including the execution of a deed? A Yes, sir.

Q From April 8th, 1948, up to the time of your mother's death in November of 1950, did you take any action whatsoever as an heir of your mother, with reference to set-

ting aside the sale of this property? A No, it was too late for me to do anything. I explained that to you. And the only action I could have taken was to have taken mother into a court room and had it settled then, and I could never have looked myself in the face again if I had dragged her into a court room in the condition she
 172 | was in. So I told my husband "We will just let it go."

Q You believe on April 8th your mother was incompetent to execute a deed? A Yes.

Q You did nothing about it until after her death? A That is right.

Q You have never done anything to set aside the sale? A Nothing to be done, because the money was collected, and as far as I know it is gone, so there is nothing to be done.

* * * *

Q I ask you if you can identify this as your mother's signature (showing document to witness)? A Where is it?

Q Right here (indicating), on the margin, "Anne G. McClellan". A It is so light I can hardly see it, but I guess it is.

Q Apparently written with a pencil, in the same manner as these figures,—a hard pencil. But that is
 173 | your mother's signature, is it not? A Yes, I believe it is.

MR. DAVIS: Will you mark this Defendant's Exhibit No. 7?

* * * *

MR. DAVIS: If the Court please, I will offer in evidence at this time the Settlement Sheet of the Lawyers Title Insurance Company, dated April 8, 1948, being their Case No. 21758, in the name of A. G. McClellan, for the sale of Lot 27, Square 2101, showing the total sale price of that property as \$21,500.00. And I direct the attention

of the Court and Jury to the Deed of Trust then existent of \$7500.00.

BY MR. DAVIS:

Q Now, you know your friend, Newton Jeffries, as a licensed real estate salesman, obtained a commission of five per cent of this deal, do you not? A I presume he would get some commission. They usually do.

Q His commission was \$1075.00 as the salesman who secured the purchaser. A I wasn't aware of how much his commission was.

174 THE COURT: So that the record may be clear, I understand there is no objection to the admission of that, and it is admitted.

MR. DAVIS: That is correct, Your Honor.

* * * *

Q Where did your mother spend the summer of 1948?

A Well, the summer of 1948 was spent at her home.

Q All summer? A I believe they went—I think Mr. McClellan took her down to the Beach maybe for a couple of weeks. I am not sure.

Q Which Beach? A I believe they went to Ocean City. I am not sure.

Q I show you this picture, Mrs. Newby, and ask you if you can identify that as a picture of your mother taken in August, 1948? A Yes. That is mother.

Q You have seen that on the mantle of her home? A I have seen it around the house.

MR. DAVIS: Will you mark this as Defendant's Exhibit No. 8? (Shows to counsel.)

MR. McCANN: No objection.

MR. DAVIS: If the Court please, I offer in
175 evidence at this time, photograph of Mrs. McClellan, taken August 24, 1948, at Atlantic City.

THE COURT: Any objection?

MR. McCANN: No objection.

* * * *

Q Now, Mrs. Newby, you knew from what your mother had told you a day or two after the execution of her will in 1946, that she had left you 3216 Klinge Road? A Yes, sir.

Q You knew she sold that property by deed dated April 8th, 1948? A Yes, sir.

Q Yet you never took any effective step to re-
176 cover your inheritance during your mother's life-
time? A I think I explained that to you before,
didn't I?

Q Answer yes or no, and then you can explain. You never did take any effective steps to recover your so-called inheritance? A No.

* * * *

Q By the way, who was the undertaker who
177 handled the funeral arrangements for your mother?

A It was a place out there—I think it is Hines.

Q S. H. Hines, 2901 14th Street? A Yes, sir.

Q You were present at the funeral service, were you not? A Certainly.

Q At your direction, did the funeral director remove a certain diamond ring from your mother's hand and give it to you? A No, sir.

Q Do you deny receiving a diamond wedding band from your mother's hand? A When Mother died, and I was in there on Tuesday morning, the little practical nurse that attended her for two months handed me Mother's little wedding band.

Q That was after your mother's death? A Yes, the morning of her death.

Q It wasn't given to you by the undertaker? A Absolutely not.

Q It was given to you by a practical nurse? A Yes.

Q What was her name? A Her name was Louise Gilbert.

Q Do you recall how long after your mother's
 178 death Miss Gilbert gave you that ring? A It was
 —it couldn't have been more than—well, when they
 called me—I had been in there until about seven o'clock, I
 would say, the night before Mother died, and I went on
 home to feed my family and take care of things I had to
 do at home. I told her to call me if there was any change
 during the night, but she didn't. And I had a call at
 seven o'clock in the morning, saying Mother was gone.

So I went in there immediately, and I didn't wish to
 see Mother in death. So they had called the undertaker,
 and the doctor was there, and they took her out. And the
 minute they took her out, why, Louise came over to me
 and said "Here is your mother's ring" and she handed
 it to me. It was just a little simple wedding band.

Q That was the very morning of your mother's death?

A I don't see anything wrong in that, because it is to be
 assumed that I would get some small token from my
 mother,—and I don't have anything—not even her gold
 thimble.

Q Now, you have mentioned an attempted suicide in
 1938, Mrs. Newby, and you say you came home and found
 your mother in the kitchen, half conscious, with all of the
 gas jets turned on? A Yes, sir.

Q Did you ever report that to the public officials
 179 of the District of Columbia? A No, sir. I didn't
 —never did. No.

Q You say prior to 1938, you found your mother com-
 plaining of some abdominal pain, and you called, as you
 expressed it, a stomach man. By that I assume you mean
 a doctor? A A stomach specialist, he was.

* * * *

A (Continuing) That was in the early stages of her
 alcoholism, and it was more or less a dramatic event on
 the part of mother. I think she wanted to get some atten-
 tion, and it was more or less a play for sympathy.

BY MR. DAVIS:

Q By the early stages, you mean in the early '30's?

A Yes.

Q After you had gone to the trouble of having the stomach man pump out her stomach, you say he found nothing chemically wrong with the contents? A That is true.

Q No traces of poison? A She admitted after it was all over she hadn't even taken the poison.

* * * *

181 Q I asked you what was the date, to your personal knowledge, that your mother last drove an automobile. A Well, I couldn't place it exactly, Mr. Davis. But I don't think she drove many times after she was married, which was in 1946, maybe two or three times she drove out to the house, and then Mr. McClellan did take over all of the driving from then on.

* * * *

BY MR. DAVIS:

Q Mrs. Newby, after you discovered after talking with Mr. Jeffress that your mother had signed a contract for the sale of 3216 Klinge Road, did you discuss that matter with your brother, Marshall Morgan? A I think I did. Yes, I told Marshall about it.

Q And did Marshall to your knowledge ever go to your mother's home and threaten to kill her and Mr. McClellan? A Yes, he—

* * * *

182 THE COURT: As it was asked, it presupposes knowledge on the part of this witness. If she has some knowledge, either by observation or by something that her mother told her, I think that is admissible. If it is known to her by one of those means, it ought to be admitted. There we are.

How do you know it, if you do know anything about it?

THE WITNESS: Well, Mother told me after this episode happened, but it was my impression that Marshall tried to kill Mr. McClellan.

THE COURT: Wait just a minute. It is not what your impression is. It may be your best recollection as to what your mother told you. I have admitted many things she told you, and I will admit that if she told you. But that is what I want to know, just what she told you.

THE WITNESS: All right. I will tell it that way. She told me Marshall came out to the house drunk and raised hell—

* * * *

THE WITNESS: And raised hell, and got in a terrible fight with Mac. Those were her words. And she also said that Marshall got nicely beaten up with a hammer, that Mac used a hammer on his head, and he was sent to the hospital and had seventeen places on his head that had to be sewed up. That was all I heard about the fight, because it occurred when I wasn't there.

BY MR. DAVIS:

Q Did you know your mother swore out a warrant for Marshall on the charge of threats? A Yes, I heard she did.

Q And the threats were against her life, not Mr. McClellan's? A I didn't know about what it was for. I know that at one time they had gotten a peace warrant out for Marshall because he was doing a lot of drinking, and he did worry them.

Q You are familiar with your brother's signature, are you not? A Yes, sir.

Q Can you identify that signature as that of (Mack) Marshall Morgan, Jr.? A That is my brother's signature. Do you want me to read that, Mr. Davis?

MR. DAVIS: I am going to offer it in evidence. (Shows to opposing counsel.)

MR. McCANN: No objection.

MR. DAVIS: Will you mark that as Defendant's Exhibit No. 9?

* * * *

MR. DAVIS: Ladies and Gentlemen: This is Defendant's Exhibit No. 9, a paper dated April 22, 1948, and reads as follows: (Reads:)

"For valuable consideration received, I, Matt Marshall Morgan, Jr. agree not to molest or annoy Mr. or Mrs. Alfred D. McClellan in any way, shape or form from this date forward. I further agree not to bother 185 or annoy any of the tenants located at 3218 Klinge Road, N. W., Washington, D. C.

Mr. Alfred D. McClellan hereby agrees to aid and assist Mr. Matt Marshall Morgan, Jr. to obtain personal belongings of Mr. Morgan now located at 3216 and 3218 Klinge Road, N. W., Washington, D. C."

(Signed) "Matt Marshall Morgan, Jr.

Alfred D. McClellan.

"Witnessed this 2nd day of April, 1948." (Signed)

"Harry J. Ahern

Thomas J. Ahern, Jr.

Attorneys-at-Law

* * * *

Redirect Examination

BY MR. McCANN:

Q Do you recall the night before your mother died, going to her room and seeing Mr. McClellan there?
186 A Mr. McClellan was in mother's room on Saturday night before she died. I remember in particular, because he was pretty well under the weather, and he was drinking a highball. And I told him he was being frivolous, and he told the nurse, he said "All Anne needs is a good drink. Get her a drink, Louise." And I said to get the hell out of the room, and kicked him out, and he got out of the room.

Mary Semley

* * * *

187

Direct Examination

BY MR. McCANN:

Q Will you please state your name, and where you live?

A Mary Semley.

* * * *

BY MR. McCANN:

Q And where do you live? A 2706 East-West Highway.

Q With whom do you live? A Mrs. Virginia Newby.

Q And how long have you lived there? A It is about four years now to my knowledge.

* * * *

Q And how long did you work for Mrs. Morgan the last time that you were employed by her? A I think it was about a year.

Q Did you work for her before her marriage to Mr. McClellan? A I did.

188 Q Will you tell what you observed with respect to their relationship before they were married, in your own language?

MR. DAVIS: Just a moment. I don't understand the import of that question.

THE COURT: I am not real sure I do, either. Come to the Bench. Step down a minute.

(Thereupon, Counsel and the Reporter approached the Bench, the Witness left the witness stand, and the following proceedings were had out of the hearing of the jury:)

MR. McCANN: Through her, I intend to offer the fact that she came to work there one morning and found Mr. McClellan in Mrs. Morgan's bedroom in his pajamas; that Mr. McClellan's bed was made up, and that when she came there and found him in her bedroom in his pajamas, Mrs. Morgan said "Mary, you know we are married." Mary said "You are?" And Mrs. McClellan said "Yes, we are."

So she went and called "Miss Virginia" and told Miss Virginia they were married. Miss Virginia said "Well, they aren't."

And then at another time she saw Mr. McClellan standing in her bedroom door in his pajamas. Those are things that she saw. That is what I am referring to.

* * * *

195 | (The following proceedings were had at the Bench, out of the hearing of the jury:)

THE COURT: Gentlemen, have you developed anything on that point we were discussing when we adjourned?

* * * *

MR. McCANN: May it please the Court: We have made some research ourselves, and we have decided to withdraw that question.

* * * *

198 Q Yesterday, you told us that you returned to work for Mrs. Morgan while Mr. McClellan was a roomer there? A I did.

Q Do you recall what the date was that you returned to work for Mrs. McClellan? A No, I can't remember the date, but I know she wasn't married then.

* * * *

199 Q Do you remember the time of year that you returned to work for Mrs. Morgan? Was it the summer, the spring, the winter, or the fall? A I believe it was in the spring, because I picked string beans out of the ground, and spring turnip greens.

Q Do you know whether that was in 1945 or 1946? Can you indicate which year it was? A I believe it was 1946. I am not sure.

Q Now, can you tell us whether or not prior to the marriage of Mrs. Morgan to Mr. McClellan, Mrs. Morgan ever told you in the presence of Mr. McClellan that she was married to him?

MR. DAVIS: I object to the leading form of the question, if the Court please.

THE COURT: Ask the witness if she ever had
200 any conversation with the decedent respecting her marriage, and ask her what was said, Mr. McCann.

BY MR. McCANN:

Q Will you please tell us whether you ever had any conversation with Mrs. Morgan prior to her marriage to Mr. McClellan, with respect to being married, and what was said? A I walked in one morning. Of course there was carpet on the stairway—

MR. DAVIS: If the Court please—

THE COURT: I am afraid we are getting into the feature right now on which you decided to withdraw the question. It sounds like it.

BY MR. McCANN:

Q Don't tell me how you walked in, not what you saw, just tell us what was said by her to you?

THE COURT: That is right.

A She told me that she and Mr. McClellan had married.

BY MR. McCANN:

Q Was Mr. McClellan there at the time? A No, he wasn't there. He had gone.

MR. DAVIS: I move that be stricken as pure hearsay, if the Court please.

THE COURT: I have admitted a good many statements made by the decedent that would hardly be admissible under the hearsay rule, but which I think are admissible in a matter of this character as statements by the decedent.

201 MR. DAVIS: But we have a question now which reflects on the integrity of the caveatee. Counsel phrased his question concerning a conversation in the presence of the decedent and the caveatee.

THE COURT: That was what the question was, but the answer was that he wasn't there.

MR. DAVIS: So I move to strike the answer as not being responsive to the question.

THE COURT: I think he's right about it not being responsive to the question. You did put it in the presence of Mr. McClellan.

MR. McCANN: Not in the last statement I made. Would you have the Reporter read the question?

THE COURT: I thought you said that.

MR. McCANN: It was the last question, but it had no reference to the conversation.

THE COURT: Read it, Mr. Bettis.

(The previous record was read by the Reporter.)

MR. McCANN: Now I request that that question be stricken, and the jury be instructed to disregard it. I think that takes care of that question. And, further, that the last question be stricken.

THE COURT: Suppose I strike it all, and then you start fresh again. Now the jury will disregard what this witness has said so far.

202 BY MR. McCANN:

Q Will you please tell the Court if you ever had a conversation with Mrs. Morgan, before her marriage to Mr. McClellan, in which she stated to you that she was married to Mr. McClellan?

MR. DAVIS: Objection, if the Court please. The question is manifestly leading. It calls for a yes or no answer.

THE COURT: Well, calling for a yes or no answer does not necessarily mean it is leading. But I thought I told you that that question was objectionable.

MR. McCANN: May it please the Court: We have been told so many things, you will excuse me if I am a little dense in grasping your suggestions.

THE COURT: All right.

MR. McCANN: Strike that.

BY MR. McCANN:

Q What conversation, if any, did you ever have with Mrs. Morgan prior to her marriage to Mr. McClellan, about being married to him?

MR. DAVIS: I object, unless it was in the presence of the Caveatee, as being pure hearsay and not relevant to the issues of this trial.

THE COURT: I will overrule the objection.

* * * *

203 THE WITNESS: Prior? That means before they were married?

BY MR. McCANN:

Q Yes. Proceed. Tell us about it. A I thought that was the question you didn't want me to answer.

Q No. You just tell us what she said to you. A She told me she and Mr. McClellan had married.

Q That is all on that. Now we will proceed to the next question. I am sorry to have delayed matters. Were you at Mrs. Morgan's house on or about the time that the sale of the house at 3216 took place? Were you working there then? A I was.

* * * *

204 BY MR. McCANN:

Q You were there when the house was sold? A I was.

Q On or about that time do you recall a conversation with Mr. McClellan concerning a telephone call which you had received from Mr. Marshall Morgan? And, if so, will you tell us what your conversation was with Mr. McClellan?

* * * *

205 THE COURT: Well, that is what he is asking her, did they have a conversation with respect to that. Do you understand the question?

THE WITNESS: I do—I think.

THE COURT: Now, you were asked what Mr. McClellan had to say. You understand that?

THE WITNESS: Concerning this telephone conversation.

THE COURT: Yes. Not what Mr. Marshall Morgan said, but what Mr. McClellan said.

THE WITNESS: About the call?

THE COURT: Yes.

THE WITNESS: Well, if he didn't stay away from there, he was going to have a warrant taken out for him to keep him away from his mother. And I do know it was on a Thursday. He asked me would I go down and swear that the son said one thing when he didn't.

* * * *

206 A So he first offered me fifty dollars to go down and be a witness, and I shook my head, and the next time he said "I will give you one hundred dollars if you go down and swear that he was going to come out here and kill everybody." He didn't say that. He said he was going to come out and play hell. And before Thursday, before going down to court like I am in court today, I moved on a Tuesday, because I wasn't going down and swear to no lie.

Q Now, you were there for a considerable period when Mr. McClellan was in the home? A Yes, sir.

Q Both before and after— A (Interposing) Yes.

Q (Continuing)—he was married to Mrs. Morgan? A Yes.

Q Were you there when the house was sold? A Yes.

Q Did you report the sale of that home to Mrs. Virginia Newby? A I did.

* * * *

207 Q Will you proceed, and tell us what happened when you returned from Mrs. Newby's? A Just as I opened the door and walked in,—I had prepared the dinner before I went to the funeral. I only came back—

MR. DAVIS: Well, now, just a moment. She's talking about 1950, apparently, now.

THE WITNESS: No, I am not.

THE COURT: I don't know anything about it.
208 Try to answer the question, won't you please, as to what Mr. McClellan said?

THE WITNESS: This is after the sale of the house.

THE COURT: Yes. After you had reported the sale of it to Mrs. Newby, if you did, and you said you did, now, what conversation, if any, did you have with Mr. McClellan, or did he have with you?

THE WITNESS: As I entered the door—I went back just to warm the dinner up, or the supper up, because I had cooked in the morning, and I only went back to warm up the dinner. And as I entered the door, he called me a name.

BY MR. McCANN:

Q What did he call you? What did he say to you?

MR. DAVIS: I object.

A He called me a God-damn son-of-a-bitch.

BY MR. McCANN:

Q What else did he say to you? A And when he called me that, I said "You are the first man who ever called me that." I said "I come out to warm up your dinner, but now I will go", and I walked straight out the door, and I stayed away two or three days before I went back.

Q Now, did he tell you why he called you that? A Because he didn't want me to let Miss Virginia know what he were doing.

Q Did he say anything about it? A He promised me a home for my life if I didn't tell her.
209

Q About the sale of the house? A About the sale of the house.

• • • •

Q Will you tell us your observation with respect to the way in which Mrs. Morgan ate while you were working there? A She didn't eat so very much.

Q What did she do? A She would rather drink.

Q Did she drink often, or did she drink seldom? A The first time I lived with her,—that was before she were Mrs. McClellan,—she drank very seldom. But after she were Mrs. McClellan, she drank often. Is that plain?

Q Will you tell us if you observed the amount of alcohol used in the house while you were there? Did you see how many bottles were used, how often they were purchased, or anything of that character?

210 MR. DAVIS: I object to all of this, if the Court please, unless he pins it down to at or about the date of the execution of this will.

THE COURT: I have overruled that, Mr. Davis. I have held that antecedent matters may be shown, for whatever value it may have of a probative nature on the condition of the decedent at the time of the making of the will.

MR. DAVIS: Counsel is asking her now how many bottles she saw around the house. There is no evidence but what Mr. McClellan may have drank, or mutual friends may have drank. By innuendo he's trying to imply that the deceased testatrix drank all the bottles he is going to have her tell about.

THE COURT: You can bring that out on cross-examination, or by testimony.

* * * *

BY MR. McCANN:

Q Will you tell us how much alcohol was consumed there, if you know, from your observation?

MR. DAVIS: By whom.

BY MR. McCANN:

Q By Mrs. McClellan. A I have walked up to Wisconsin and Macomb and got whiskey for her when there wasn't any in the house, and it would be a fifth—Imperial.

Q How long would it last? A The next morn-
211 ing it would be a empty bottle.

* * * *

Cross-Examination

* * * *

Q How long have you been a resident of the District
of Columbia? A 23 years.

Q When was Mrs. Anne G. Morgan married? A She
was married—it was some time after she told me that she
had married.

Q When was she married? A I don't know what
month it was, but I know when she married, her
212 daughter and granddaughter went to her marriage.

Q You were still working for her at that time?
A Yes, I did her work and other day work. I wasn't
there every day, but I was there every night.

Q What season did she get married to Mr. McClellan?
A It was in the fall.

Q What month? A I wouldn't dare to say, because
I don't want to tell no story.

Q Do you know what year? A No, I don't have the
calendar, what year.

Q Did you have a calendar when you were answering
Mr. McCann's questions and you told him you had this
conversation with Mrs. Morgan in the spring of 1946? A
I said it was in the spring of the year, because there was
spring turnip greens and string beans, and I picked them
out of the back yard.

Q You fixed the year as 1946. A That is what I made
a guess at, 1946.

Q You just made a guess. Now can you make a guess
as to what year she got married in, in the fall? A It was
the same year.

Q The same year. What house were you working at at that time? A The small house where she died
213 at.

Q What is the address? A 3218, if I make no mistake. One was 3216 and the other, I think, was 3218. She died in the small house, but I lived with her in both houses.

Q She died at 3218, the small house? A The small house.

Q And that is the house you were in on the day she was married to Mr. McClellan? A Yes, sir.

Q 3218? A Yes, sir.

Q Were you employed as a cook or maid at that time? A I was part-time maid, because I had other work.

Q On this other work, were you also working for Mrs. Newby out in Chevy Chase at that time? A Yes.

Q You were rotating between the two places? A And in Georgetown, at Miss Lilly Yelverton's.

Q How long have you known Mrs. Lillie Yelverton? A She was a roomer in the large house. She wasn't living with us in the small house. She had moved away.

Q Were you working for Mrs. Morgan when Mrs. Yelverton was a roomer at her house? A Yes. I did Mrs. Yelverton's laundry.

214 Q Did Mrs. Morgan live in the same house Mrs. Yelverton rented a room in? A Sure. This is the large house, understand.

Q Yes, I understand. And that was the same house Mr. McClellan first came to live in when he became a roomer of Mrs. Morgan's? A Yes.

* * * *

Q Do you know a Mr. Griffin? A Yes.

Q He's a cousin of Mrs. Newby? A Yes.

Q Did he live in the large house? A Yes.

Q The same house Mrs. Yelverton and Mr. McClellan lived in? A And Mr. Frank—a man from Pennsylvania.

Q Who else? A First name was Frank. He was from Pennsylvania.

* * * *

215 Q Now, getting down to the day when Mrs. Morgan married, you say you were home that morning?

A I were home that day. I wasn't there all day. I had other work.

Q What time did you come to work the day she was married? A I was in that evening in time to get dinner.

Q Where had you been the rest of the day? A I had work in Georgetown, at Miss Lilly's. Miss Lilly had an apartment. I took care of her apartment some length of time.

* * * *

Q I am directing your attention specifically to the date Mrs. McClellan got married—Mrs. Morgan, rather—the day she married Mr. McClellan. A She married that day and I came in that evening.

Q You remember that day? A Because I spent
216 my nights there.

Q You lived at 3218? A Yes.

Q You had a room there, so you would be on the premises? A Yes.

Q All right. And you remember that day particularly because it was the day Mrs. McClellan got married? A Yes.

Q Now, where did you work that day during the day hours? A I think I went to Wesley Heights.

Q Wesley Heights? A Yes. That is on this side of that White park out there.

Q Was that Mrs. Yelverton's address? A No, no, no.

Q What is the name of the lady you worked for in Wesley Heights? A Mrs. Skinner. I did day work there.

* * *

Q All of these questions are directed to the day
217 Mrs. McClellan got married. A I think the day
she married I was at Wesley Heights. I left from
home in the morning and went to Wesley Heights and
did my work. I wasn't supposed to be there until nine,
nine-thirty, and the quitting time was four.

Q Did you see Mrs. Newby at all on the day her mother
got married? A I did.

Q Where? A She was going home and I was going
to the house.

Q What time? A Late in the evening.

* * *

Q Who was with Mrs. Newby at that time? A Her
and Anne, the oldest child.

Q And did she tell you she had just come from the
wedding? A Yes.

Q Had you seen Mrs. McClellan at all before you left
the house? A I saw her in the morning when I
218 left and went to work.

Q What was her condition when you left in the
morning? A She was still in bed.

Q Still in bed? A Yes.

Q Was she sober or drunk at that time? A No, she
wasn't drunk.

Q She wasn't drunk? A No, because I woke her up
to let her know that I was leaving.

Q What time did you leave that morning? A I left
early enough to be in Wesley Heights by nine or nine-
thirty.

Q Now, you have mentioned a conversation with Mar-
shall Morgan, a telephone conversation. You said he
made some remark about coming up and playing hell. Is
that what you said? A Yes.

* * *

BY MR. DAVIS:

Q All right. Will you give us the circumstances
219 under which Mr. Marshall Morgan called up and
said he was going to play hell? A He said the
reason he told me he was going to come out there and
play hell, if I didn't want to be in the mess I had better
leave.

Q If you didn't want to be in the mess you had bet-
ter leave? A Yes.

Q And who was present when he made that statement?
A He made it over the telephone. Wasn't nobody in
the house but I. They had gone out for a drive.

Q He was just talking to you? A Yes.

Q And he told you— A (Interposing) Yes.

Q (Continuing)—if you didn't want to be in a mess—
A (Interposing) He was warning me.

Q (Continuing)—you had better get out of there? A
Yes.

* * * *

Q Did you know Mr. Marshall Morgan had been
220 brought to the Police Court on a threat charge, and
been arrested? A I was supposed to be a wit-
ness.

Q Did you know what happened? A I didn't go be-
cause I moved.

Q You didn't want to be played hell with?

MR. McCANN: Objection.

A I didn't want to swear to a lie, because he didn't
say he was going to kill anybody. He said he was going
to play hell.

* * * *

Q You started to say something about another conver-
sation.— A (Interposing) Yes.

Q (Continuing)—you had with Mr. McClellan, that you
had prepared the dinner after the funeral. A I pre-
pared the dinner before I went to the funeral,—in the
morning.

Q Whose funeral were you talking about? A It was a funeral at my church.

Q Not Mrs. McClellan's funeral? A No, no.

Q What was the date that funeral took place?
221 A I wouldn't dare to say.

Q What year? A It was the same year the house was sold.

Q What year was the house sold? A I don't know what year it was, but I know it was the same year, because that is when he called me those names.

Q Do you know how long after Mrs. Morgan was married to Mr. McClellan the house was sold? A It was in the same year.

Q In the same year? A Yes.

Q The house was sold the same year she was married? A Yes.

* * * *

Q You knew you were going to be called—

* * * *

BY MR. DAVIS:

Q (Continuing)—upon to testify in this case, did you not? A No, I didn't.

222 Q You didn't know it? A No.

Q Are you here today under subpoena?

* * * *

MR. McCANN: She is not under subpoena.

Q So you are here as a voluntary witness on behalf of Mrs. Newby? A Yes.

223 Q Mrs. Newby asked you to testify? A No, she didn't.

Q What did she say? A She asked me if I could remember what happened in her mother's lifetime.

Q Did you talk over with Mrs. Newby what you were going to testify? A No.

Q Did you ever talk to Mr. McCann about what you were going to say? A I just told him I would tell the truth, whatever they asked me.

Q Did you talk it over with him, what you were going to testify about? A No.

Q Never did? A No.

Q Now, I believe you said on one occasion Mr. McClellan offered you fifty dollars? A Yes.

Q If you would come down to the police court and testify against Marshall Morgan. A Yes.

Q And you turned it down? A Yes.

224 Q Then you said he raised the ante to a hundred dollars? A Yes.

Q How long after he made the first offer? A Oh, it was the same day.

Q Same day; and you turned down a hundred dollars? A I did.

Q I believe you also said that he offered you a home for life? A No, he didn't promise me—he promised me a home.

Q A home. When did he make that promise? A Not to tell about the house was sold.

Q When? A Not to tell about the house was sold.

Q Now, when did you make this report to Mrs. Newby that the house was sold? A A day or two after it was did.

Q What? A A day or two after the house was sold.

Q Was that during the same year— A (Interposing) Yes.

Q (Continuing)—that Mrs. McClellan was married? A Yes.

225 Q During the time Mrs. McClellan was sick from this cataract operation, were you working for her then? A Yes.

Q When did you stop working for Mrs. McClellan? A I stopped work on the day, on a Tuesday, before they went to court on a Thursday.

Q You are talking now about the Marshall Morgan episode? A Yes. And all I did since then was to go

by and fry her chicken on a Friday evening, after leaving Georgetown I would go by there and fry her a chicken for the week-end, and then I would go on to Maryland, to her daughter's, where I live at now.

* * * *

226 Q Did there come a time when you stopped working altogether for Mrs. McClellan? A Yes, since the court case.

Q Which court case are you talking about, the Marshall Morgan court case? A Yes.

Q You stopped working for her altogether? A Yes.

Q What caused you to stop working for her. Did she fire you? A No, she didn't fire me.

Q Who fired you? A Nobody didn't fire me. I quit.

Q Mr. McClellan fired you? A Mr. McClellan didn't fire me. I quit.

Q You quit of your own accord? A Yes.

* * * *

227 Q When did you first go to work for Mrs. Morgan? A It was after the Casey's moved to the country, out to Rockville.

Q I haven't the slightest idea as to who the Casey's are, or when they moved to Rockville. Can you give us the year? A I doubt it. I don't remember the year.

Q Can you tell us how many years altogether you worked for Mrs. Morgan? A Altogether, I would say probably four, maybe more or less.

Q Probably four? A And it may be more or less. But part-time—not straight through.

Q Four or less. It wouldn't be four or more, would it? A It could be more, and it could be less.

Q If I told you the Marshall Morgan affair was in April of 1948, would that put your first employment with Mrs. Morgan back to approximately 1944? Is that right?

A I won't say which year it was, because I can't say.

228 Q And you said on your direct examination that from the time you first went with Mrs. Morgan up to the time Mr. McClellan married her, she drank very little? A Yes.

Q And it was only after she married Mr. McClellan that she became a heavy drinker? A Yes.

* * * *

230 *Lewis L. Griffin*

* * * *

Direct Examination

* * * *

Q Will you please state your name and your address?
A Lewis L. Griffin. I live at 1489 Newton Street, Northwest.

* * * *

231 Q What relationship, if any, did you have with Anne G. McClellan? A She was my aunt, my mother's sister.

Q When did you first meet your aunt? A Oh, as quite a child. I saw her quite often as a child, on visits.

Q Where did you visit her? A At her home in Nashville, Tennessee.

* * * *

Q Did you ever visit her after she moved to Washington? A Yes, when I arrived in 1941.

Q Well, now, prior to 1941, did you see your aunt at any other place any time, and, if so, please identify the place and time? A Yes. We spent a couple of months together at my uncle's ranch in New Mexico in 1937, I believe, the uncle being my mother's other sister's
232 brother and Mrs. Morgan's brother-in-law.

Q Would you tell the Court and Jury what her condition was at that time, what you observed about Mrs. McClellan in 1937?

MR. DAVIS: I object, if the Court please, as being entirely too remote—nine years before the execution of this will.

THE COURT: I have let in evidence, I think, touching and going back almost to her childhood. I think I will admit it.

I need not again repeat that I think the only critical time as to this decedent's testamentary capacity is at the time of the execution of the will that is here involved, or the paper writing purporting to be a will. This other evidence is material only insofar as it may or may not throw light on that particular critical period. But I do think it is admissible on that ground.

* * * *

A Mrs. Morgan—I was rather surprised to see that Mrs. Morgan at that time was drinking a bit, which was rather a surprise to me. I know that one time she was in bed several days, having drunk a great deal of beer which she had got hold of. She kind of tried to keep it secret, I am sure, because of the fact her brother-
233 in-law frowned on the practice.

Q When did you say you came to Washington?
A I arrived in Washington in July, 1941.

* * * *

Q And when did you move to her address? A Later in the summer of 1941.

Q And how long did you live with her? A From the late summer, or I should say summer of 1941 until February, 1942, at which time I was lucky enough to secure an apartment for myself.

Q Describe the condition of Mrs. McClellan during the period you lived with her? A Well, she seemed to have deteriorated a great deal more, was drinking much more heavily, and I was quite surprised to see the difference, the change in her. Her daughter at that time had—her husband built a house, and they had moved away, and

Mrs. Morgan and I and several other roomers were living there. And I prepared the meals and tried to get Mrs. Morgan to eat, which she very seldom would, but would start her drinking quite early in the morning, and was in a rather fuzzy condition most of the time.

Q Did you say fuzzy, or foggy? I didn't get it.

234 A Well, either one. Foggy, I suppose would be the word.

* * *

Q Were you called from the house, at Mount Alto, on any occasion because of your aunt? A Yes. I had been called during the day, to help her out of the bathtub. I know on two occasions, in which she had slipped and fallen, on her way to the bathroom and after she got into the water and had fallen into the tub, and there was no one there but the maid, and we had a bit of trouble getting her out.

* * *

Q How many times, if you recall, were you called because of such situations? A Approximately about four times.

Q Mr. Griffin, would you try to explain to us what you mean by the fuzzy or foggy condition in which your aunt was?

MR. DAVIS: I object, if the Course please. That is exclusively a jury function. The witness can tell
235 what he saw, and let the jury form their own conclusions.

THE COURT: Well, it is permissible for a witness to say what he means by the use of a certain term. Of course it is for the jury to determine what the facts are. But he has used a term—I think he said fuzzy and counsel asked him if he said foggy, and the witness said, "Well, either term, but maybe foggy is better." Now he is being asked what did he mean by that. I think that is a legitimate question.

MR .DAVIS: Very well.

* * *

THE WITNESS: Well, I think she lacked concentration. If I asked a question, she quite often had to have the question asked again in order to get a reply. And sometimes,—well, I would say most of the time—her replies were not straight to the point. Well, it was almost as if she was sleepy.

BY MR. McCANN:

Q What about her memory? Do you recall what her condition was with respect to memory? A Yes, sir; quite vividly. Her memory was exceedingly bad. She had the practice, when she was in a better condition, she would repeat stories over and over again, sometimes one she told just a few minutes before.

* * *

236

Cross-Examination

* * *

Q Are you married, sir? A Yes, sir.

Q Do you live with your family at 1489 Newton Street Northwest, now? A Yes, sir.

Q When you first came to the District of Columbia,—from St. Louis, Missouri, was it? A Yes, sir.

Q You came alone, I take it? A Yes, sir; and I was not married then.

Q You were not married then? A No, sir.

Q What was the year of your marriage? A March 16th, 1945.

Q 1945. So that when you came to live with your aunt on Klinge Road, you were a single man? A That is right.

Q At that time, how many properties did your aunt own on Klinge Road, do you know? A Two, I believe; 3216 and 3218.

237 Q You say when you first came to Washington, she had no available space for you, because both places were filled? A Yes. I believe 3218 was rented, and Mr. and Mrs. Newby and their family were living with my aunt at that time.

Q In 3216? A Yes, sir.

Q And 3218 was fully rented to roomers? A Yes, sir.

Q Did your aunt also supply board at that address, 3218, in addition to rooms? A I don't believe so.

Q Just rooms? A Yes, sir.

Q So, when you first came to Washington, you stayed at Mount Alto Hospital, where you were employed? A Yes, sir.

Q You stayed there until July, 1941? A I arrived in July, 1941. It was some time in the late summer, I don't exactly recall the exact date, I moved to 3216.

Q Then you took a furnished room at 3218 Klinge Road? A 3216.

Q 3216? A Yes, sir.

Q You lived with your aunt? A That was after
238 the Newby's moved. That was one of my reasons for moving, because Mr. and Mrs. Newby had built a house of their own.

Q Your aunt had converted her own private quarters into a rooming house? A Yes, sir.

Q And you took a room at 3216? A Yes, sir.

Q You stayed there, I believe you said, until February, 1942? A Yes, sir.

* * * *

Q Did you take board at your aunt's or just have a room? A I did the cooking and bought the stuff myself, the food myself. And I myself and two other roomers did the work together.

Q You did the cooking for these other two roomers, too? A Yes, sir.

Q Did your aunt take her meals with you? A When she ate.

239 Q And the other two roomers pooled their resources to buy the food with you? A Yes, sir.

Q And you were the chef for all four? A Yes, sir.

Q What rental were you paying your aunt for the quarters you occupied? A I am afraid I don't remember the figure, sir.

Q Was it on a monthly basis? A Yes, sir.

.

Q And who fixed the rental you were to pay her? A I believe my aunt and I arrived at it.

Q It was a mutual arrangement? A Yes, sir.

Q And did you ever compare the rental you were paying your aunt with the rental these other roomers were paying? A No, sir.

Q Were you given to understand that because of the family relationship, she made you a better concession, or a lower rate? A No, sir. I don't believe so.

Q Your testimony is she charged you the same
240 as she charged the other roomers? A Yes, sir.

Q With respect to these other roomers, did she make the arrangement with them as to the amount to be paid? A Well, I don't know what one of them was paying at all, because a Mrs. Yelverton was living there when I moved there, and the other roomer was a technician who was employed the same place I was, and I brought him there so he would be near the hospital, and to also fill a vacancy which my aunt had.

Q What was the name of this other technician? A I can't remember his name right now. It escapes me right now.

.

Q Your aunt collected the rentals as they became due, did she not? A Yes, sir

Q Did she give a receipt to each one of the
241 roomers? A I don't think so. She never gave me
one that I remember.

Q Never gave you a receipt? A No, sir.

Q Did she ever fail to collect the rental? A It wasn't
a case of collecting. We usually brought it to her room.

Q She was perfectly competent to manage the busi-
ness affairs of running a rooming house, was she not?

MR. McCANN: Just a moment, if the Court please.
That calls for a conclusion.

THE COURT: There are a lot of conclusions that
have been called for by these witnesses, and as to testa-
mentary capacity, as to which there couldn't be any more
of a conclusion, I think he can state whether or not in his
observation she was competent to run the house.

.

242 A It is not exactly a case of running the place
as a rooming house. The people who stayed there,
one was a very close friend, and one a relative, and the
other roomer. I can't remember his last name, his first
name was Frank. We usually brought our rent to her
room, where she was usually in bed, and laid it on the
coffee table beside the bed and said "Here is the rent."
And that is about all the management came to, that I can
see.

243 Q Did you do that on every occasion you paid
her rent, take it up to her bedroom and lay it on
the coffee table? A Every one I can remember.

Q Did this other technician do that? A I don't know
how he handled it.

Q Did Mrs. Yelverton do the same thing? A I think
so.

Q Brought it into the bedroom and laid it on the
coffee table? A Yes, sir.

Q How many roomers did she have at 3218 Klinge
Road? A I don't know, sir. I believe that was rented

out as a unit to a family, as I recall. I believe it was an Army officer and his family.

Q And do you know what rental they paid? A No, sir. I do not.

Q They paid that directly to Mrs. Morgan, did they not? A I imagine they did, but I did not have any contact with them, and I don't recall ever seeing them.

Q Living next door, there would be no occasion for her to have a rental agent to collect it, would there? A No.

Q Of course she always paid the taxes on those properties during the years the properties were in her name? A I suspect that Mrs. Newby took care of that chore for her, as well as to collect the rent.

Q That is just a suspicion? A That is my suspicion, yes; she took care of everything else.

Q Now, you mentioned four calls that you received. A Yes, sir.

Q Were all four of those calls during the period from the latter summer of 1941 to February, 1942, while you were resident at the home? A Yes, sir. I was called once after I moved, to take care of a similar situation, when I had moved away a few blocks.

Q Only once? A That I can remember.

Q Was that in the year 1942? A Yes, sir.

Q When did you first meet Mr. McClellan? A I believe it was some time after he and Mrs. McClellan were married. I don't recall the date, sir.

* * * *

245 Q After meeting Mr. McClellan after his marriage to your aunt—you were married yourself at that time, were you not? A Yes, sir.

Q Did you ever invite Mr. and Mrs. McClellan over to your home? A No, I believe the only time my
246 aunt was ever in my home was prior to her marriage to Mr. McClellan.

* * * *

Q Had you ever visited your aunt in the District of Columbia prior to 1941 when you came here to the Veterans Administration? A Yes, sir. I visited her for a short while in 1921, on my way to visit my mother's other sister, who was living in England at that time.

Q That was 30 years ago? A Yes, sir.

247 Q But you hadn't seen her from that visit in 1921 until 1941 when you came here to work for the Government? A With the exception of the time we spent together at the ranch in the West.

Q How much time was that? A About three months.

Q And that was in 1937, you say? A I believe it was 1937. Yes, sir.

* * * *

Q You saw Mrs. Morgan several times intoxicated, I believe you said? A This one occasion on which she was incapacitated for any length of time was one period that I remember. Yes, sir.

Q Well, during the three months period in 1937, how many times did you see her incapacitated, as you
248 say? A Well, only once during that time, although I did see her quite a bit under the influence of champagne at a party given by my uncle.

Q Your uncle was quite a gracious host, was he not, and always had friends in, supplying them with drinks?

A I can only remember the one party given as an opening to the ranch for her. There were a number of celebrities—supposed to be a dude ranch, and there were facilities there for guests, and this was the opening occasion.

Q So from 1937 you did not see your aunt again until 1941, when you came to live here with her? A That is correct.

Q On the occasion of these four telephone calls, you say the only one at home with your aunt was her maid?

A As I recall.

Q Do you recall the name of that maid? A No, sir. I don't.

Q White, or colored maid? A Probably a colored maid, as I remember.

Q Did she make the beds of all the rooms rented at that address? A Yes, sir. I believe she did.

Q Now, you have defined, or described her by your expression, foggy or fuzzy, as lacking in concentration.

Is that right? A Yes, sir.

249 Q And you gave this description in pursuance of Mr. McCann's follow-up questions on this drinking habit of your aunt's. A Yes, sir.

Q Have you ever seen a person who did indulge in alcohol, even to a slight extent, two or three highballs, who was not lacking in concentration? A Well, sir, it depends upon the extent to which the person has indulged, is my observation.

Q You also say under the head of foggy or fuzzy, that that person's replies were not straight to the point? A Yes, sir.

Q Isn't that true of anyone who indulges in alcohol? A The same answer applies there, I believe, sir.

Q You have also described it as involving a bad memory. A Yes, sir.

Q Isn't that likewise true of anybody who has had a few drinks? A Maybe so.

• • • •

251 *Robert E. Newby*

• • • •

Direct Examination

• • • •

Q Will you please state your name and your address?
A Robert E. Newby; 2706 East-West Highway, Chevy Chase, Maryland.

Q Are you the husband of the Caveator, or Plaintiff in this action, Virginia M. Newby? A I am.

Q And where are you employed, and in what capacity?

A I am a Special Agent with the Federal Bureau of Investigation, United States Department of Justice.

Q How long have you been so employed? A Since April 6, 1931.

Q Where have you been employed during that
252 period? A Nearly all of it right here in Washington.

* * * *

Q Will you state, at the time of your marriage, whether or not Mrs. Morgan objected to your marriage?

A She did not. On the contrary, she congratulated me and wished me many happy years.

Q How did you and your mother-in-law get along together? A Got along fine.

253 Q Will you tell the Court and Jury what activities you engaged in together? A Commencing with our marriage in 1923, we spent many years, eleven years approximately, together in the same house. And in the evening, why, we enjoyed playing cards together with the neighbors, and during that period we took trips together, and got along fine with her.

Q When did your relationship with your mother-in-law change, if ever? A It started changing in the '30's.

Q Will you explain the reason if any for the change?

A Well, she and her husband separated, and she was lonely and despondent, and she wanted Mrs. Newby and me to remain close by, and we stayed in the same home with her. Then it occurred to her probably we would like to have a home of our own, so she arranged to buy the home next door to where she was living, and we moved into that house.

Q Do you know who furnished the money for that?

A Her brother-in-law.

Q Continue, please. A We stayed in that home for about one month—that was in 1932—and she took a trip to Europe, and in that time, why we moved back to 3216, the larger house.

* * * *

254 Q Who was living there at 3216 when she went to Europe? A Just the wife and the oldest daughter.

Q Well, I mean, was her husband left there with Marshall Morgan at that time? A No, he had left.

* * * *

Q Now, when did Mr. and Mrs. Morgan separate?

* * * *

255 THE WITNESS: In 1932.

* * * *

Q When did their divorce take place? A I don't know.

* * * *

Q Now what, if any, change took place in Mrs. Morgan after the divorce? A Well, there developed over the period of years that we were in the house there together, an antagonism toward me. I can't explain just how or why that developed, but it did, and it developed to the point where it was necessary to consult professional advice, and it was recommended that we move to another house.

Q Now, when did she demonstrate this ill-will toward you, at what times? A In the evenings. She would remain in her room, and just bang the doors upstairs, and walk around and—

Q What were her habits at that time? Did she change her habits any after the divorce from her husband? A Yes. She started drinking.

Q Well, to what extent? A Well, I can't say to

what extent, but her mannerisms were such that
256 she didn't know what she was doing.

Q Now, was it at the times when she was drinking, or when she was sober, that she was disposed to be unfriendly to you? A While she was drinking. She was apologetic thereafter.

* * * *

Now, did she have any different attitude toward the little girl? Did she develop an unfriendly attitude toward the little girl about the same time? A Yes, she did.

Q Tell us about that. A Well on several occasions I would hear the little girl—she was not in good health—call to her mother, who was downstairs with me, and Mrs. Morgan would be upstairs, and she would go into the baby's room—that was Jane's room—and tell her to stop annoying her mother, and try to make her go to sleep.

Q Do you know of her having arguments with the child—anything of that kind? A Well, I could hear her up there, telling the baby that the baby didn't love her Nanny, and try to precipitate an argument.

Q Did you hear anything else Did you ever hear any other manifestations of ill feeling toward the child? A

That is the only thing that I can recall.

257 Q Now, when did you go to see a doctor about this situation? A In November of 1940.

Q Whom did you see? A Doctor Antoine Schneider.

Q Who was he? A He was on the staff at St. Elizabeth Hospital.

Q And what did you go to see him about?

MR. DAVIS: I object.

THE COURT: Well, the witness has already said—and I take it this is the occasion he has reference to—that because of the situation that had developed, he consulted professional advice, and as a result he moved out of the place.

MR. McCANN: That is correct.

THE COURT: I think that is as far as it can be properly gone into.

MR. McCANN: We will not urge it any further, Your Honor.

BY MR. McCANN:

Q What did you do after consulting with the physician? A I wrote my brother-in-law—

Q Let's forget about writing to your brother-in-law. What did you do about staying there or moving? A We started looking for another house.

258 Q And when did you move? A On December 1st, 1941.

Q And to what place did you move? A To 2706 East-West Highway.

* * * *

Q Did you ever visit the home of Mr. and Mrs. McClellan after they were married? A I did.

Q Will you describe the condition in which you found Mrs. McClellan on those visits? A Well, on every occasion that we went in there in the evening, Mrs. McClellan was either upstairs, and on a few occasions she was downstairs, and on the occasions she was downstairs, I could tell that she had been drinking.

Q What was the condition of Mr. McClellan when you visited Mrs. McClellan in the evenings? A He would always have a highball, and would always try to offer me one, and I would decline.

Q What was the condition of Mrs. McClellan—what was Mrs. McClellan's physical condition when you visited them there? A She was very weak. It was hard for her to get around, and compared to the previous, or the last ten years we lived with her, she was in a mental
259 stupor, or a fog—just didn't have complete control of her faculties.

Q Did you observe anything about her gait that you

could tell the jury? A She walked sort of wavering, and as though her knees were giving away.

Q Did you notice any particular thing about her head, that you could call attention to? A It would pop around constantly, just like she didn't have control.

* * * *

Q Do you recall visiting the home of Mrs. McClellan on the Saturday prior to her death? A I do.

Q Did you see Mr. and Mrs. McClellan that evening? A I did.

Q Will you tell what you observed? A That evening, Mrs. Newby asked me to accompany her to see her mother. Right after dinner we went in—

MR. DAVIS: If the Court please, I must object to this, as certainly too remote to the issues of this case—the Saturday prior to her death. We concede she
260 was an ill woman. She had a cataract, and a broken hip, and had been hospitalized.

THE COURT: I think I will let the witness answer the question.

THE WITNESS: Upon arriving at 3218 Klinge Road, my wife went to the second floor. She walked into one of the bedrooms up there and I—

MR. DAVIS: Did you walk up with your wife?

THE WITNESS: No.

MR. DAVIS: I object, then.

BY MR. McCANN:

Q Only tell us what you saw.

THE COURT: Yes, Mr. Newby. I have said you may answer it, but that means only what you know and what you observed—not what you learned some other way.

THE WITNESS: Yes, sir. She went to the second floor. I could overhear a conversation, on the first floor. Mr. McClellan said "All she needs is another drink." I heard my wife say "You get out of here." And then I next saw Mr. McClellan coming downstairs with a highball

in his hand, with the highball in his left hand and grabbing onto the rail with his right. And he complained that Mrs. McClellan had been drinking too much. He made the observation that—he told me that she had issued seventeen checks totaling \$77.00 in the preceding two weeks, for liquor.

And he reminisced that evening. He always got
261 on the subject of my father, who was also employed at the General Accounting Office years ago, and what a fine man he was. And that was the general topic of our conversations when we would go there in the evening.

Q What did you say to him at that time? A I said "Mac," I said, "Mrs. McClellan is ill" and I said "This is the time to remain sober, because in the next few days you are going to have a few important decisions to make."

Q Is that all that took place that evening, as you recall? A That is all.

* * * *

Cross-Examination

* * * *

Q Mr. Newby, are you a native Washingtonian? A Yes, sir.

Q And your present rank, I understand, is that of a Special Agent of the F.B.I.? A Yes, sir.

Q And you have been with the F.B.I. since
262 April 6th, 1931? A Yes, sir.

Q Are you a lawyer, or an accountant? A A lawyer.

Q You are a lawyer? A Yes, sir.

Q From what school did you receive your law degree? A I did not receive a degree. I went to George Washington University Law School, but didn't complete the course.

Q You did not complete the course? A No, sir.

Q You have never received your A.B. degree? A No, sir.

Q Did you complete a three of four year course? A I was there in two schools, academic and law—six years altogether.

Q Six years altogether? A Yes, sir.

Q Did you receive an A.B. degree? A No, sir.

Q Have you any degree? A No, sir.

Q Have you ever taken the Bar examination, or been admitted to a Bar? A No, sir.

263 Q Are you in the F.B.I. under the status of attorney or accountant? A Attorney.

* * * *

Q Are your duties primarily investigative, Mr. Newby? A Yes, sir.

Q And during the twenty years you have been with the department, you say practically all of that time has been in the District of Columbia? A Yes, sir.

Q How much of a law course did you have,—the full three year course? A Two years.

Q Two years. You didn't have the full equipment for an LLB degree? A That is right.

Q In the course of your investigations, have you had occasion to investigate will contests, matters involving wills? A No, sir.

Q In the course of your law studies,—you studied wills, did you not? A No, sir.

Q You did not. So you do not know the legal requirements in a will case? A That is right.

Q Now, you have been married to your wife, Mrs. Virginia Newby, for some twenty-seven years? A That is right.

Q She was eighteen years old at the time you married her? A Just turned eighteen.

* * * *

Q How old were you at that time? A I was 23.
265 A Yes, sir.

Q Immediately after your marriage, did you then take up your married domicile with your mother-in-law? A I did.

Q Which house was that, 3216 or 3218 Klinge Road?
A 3216.

Q And you lived with her for some eleven years? A Except for a two year period, or eighteen months, we moved in an apartment, about 1925 and 1926.

Q What was the occasion for your leaving your mother-in-law in 1925 and 1926? A We wanted to set up a separate apartment, just to be to ourselves.

Q You had no friction with your mother-in-law at that time? A None at all.

Q You were on perfectly good terms with her? A That is right.

Q Why did you move back with your mother-in-law then in 1927? A My mother-in-law persuaded my wife to move back with her.

Q So altogether you were there for a period of eleven years before any friction set in? A That is right.
266 You say during that period you played cards with her in the evenings? A We did.

Q What sort of cards did you play? A Bridge.

Q Did you ever play poker? A Poker.

Q Were any of the neighbors in on these poker parties? A Neighbors were there.

Q Your mother-in-law was a very good poker player?
A She was.

Q She knew the value of a hand? A Yes.

Q She knew how to pull the usual bluff, as we say, in poker? A She did.

* * * *

Q Now, during the eleven years you were with your mother-in-law, how well did you get to know your brother-in-law, Marshall Morgan? A Very well.

267 Q Did he ever live at 3216 Klinge Road? A He did.

* * * *

Q But she did not exhibit any antagonism toward you as a son-in-law until after that divorce? A That is right.

* * * *

Q Now, during the eleven years you lived with your mother-in-law, did you pay any rent for the occupancy of the premises at 3216 Klinge Road? A The arrangement under which we lived at 3216 Klinge Road was that we should pay for the food and maid service, and
268 contribute in that manner. As to how much rent we paid, I don't recall.

Q You didn't pay any rent, did you, to Mrs. Morgan? A Well, I don't recall.

Q If you paid it, you would recall it, would you not, Mr. Newby? A If I had paid it personally?

Q Yes. A Yes.

Q Did your wife ever tell you that she paid rent to her mother? A Not that I recall.

* * * *

Q You say that after the divorce in 1934, when she started to display this antagonism to you, she would remain in her own room in the evenings. Your work with the F.B.I. entailed practically all day work, did it not? A And night work

Q And you were away at work or at your office during the day? A That is right.

269 Q And you would spend most of your evenings at home? A Yes.

Q You say you would notice on some occasions when your mother-in-law remained in her room, and you and

your wife were downstairs, I assume in the living room, your youngest daughter, Jane, would call out to her mother. Is that right? A That is right.

Q How old was Jane in 1934? A She was one year old.

Q One year old. And, ostensibly, she would be put to bed by your wife. Is that right? A That is right.

Q And she kept calling for her mother? A Not at one year.

Q Well, didn't you say on direct examination you heard her calling? A In that period of time.

Q And that then Mrs. Morgan would go into the child's room and try to get her to go to sleep? A Yes

* * * *

270 Q Her primary object was to try to get the child to sleep, isn't that true? A Yes.

Q Would your wife ever go up on those occasions to try to quiet the child and put her to sleep? A She would.

Q And then after consulting Dr. Schneider, he advised you to set up an independent household? A In 1940, yes.

* * * *

Q When did she acquire title to 3218? A In June of 1932.

* * * *

Q Didn't you say you left in 1934? A 1941.

Q 1941. So that for a period of nine years before you left, she owned both of these houses? A That is correct.

271 Q Did I understand you correctly when you said that her brother-in-law purchased the house for her at 3218? A That is what he told me in Mrs. Morgan's presence.

Q Do you know any reason why her brother-in-law should buy a house and place it in her name? A No, I don't.

Q Now, Mr. Newby, do you know a detective on the local Police Force named Blick—Roy Blick? A Yes, sir.

Q Did you ever have occasion in the course of your investigations for the F.B.I. to ride around with him in a squad car? A In the '30's, yes.

Q At which time Mr. Blick would raid certain places, for instance, houses of prostitution, gambling joints, and so on? A Yes.

Q You weren't taking part in those raids as an official member of the F.B.I., were you? A Yes, sir.

Q You were? A Yes, sir.

* * * *

272 Q You say these excursions with Mr. Blick were in the '30's, were they not? A Yes, sir.

Q On how many such occasions would you accompany him on local raids? A I don't recall.

273 Q Was it more than eight or ten? A I can recall one.

Q Local raids involved purely local matters, District of Columbia law enforcement, did they not? A No, sir.

Q Did your wife ever object to your nocturnal absences away from home? A On occasions.

Q Mr. Newby, did you know that your wife had left written instructions as to the disposition of your children in the event of her death, or anything happening to her? A No, sir.

Q I will show you Defendant's Exhibit No. 4, and ask you if you can identify that as your wife's writing and signature? A I do.

Q Did you know your wife had executed this paper and left it with your mother-in-law? A No, sir.

Q Had you given her any authority to execute such a paper, or consented to any adoption of your children? A She had told me on several occasions she wanted her mother to take care of the children in the event of her death.

* * * *

274 Q Would you want your children to be left with a chronic alcoholic? A I don't know the date of that paper.

Q Within the last seventeen years? A No, sir.

Q After the marriage of Mr. McClellan to Mrs. Morgan in 1946, did you and your wife ever visit the McClellan's at their home on Klinge Road in the evening?

A Yes, sir.

Q On how many occasions did that happen? A My wife would say "I haven't been in to see mother today. I want to go in this evening." On the days she hadn't been there in the daytime, I would accompany her there in the evenings. Sometimes we would walk in on a bridge game.

Q You mean when they had other guests? It takes four to play bridge, does it not? A That is right.

Q How many times since October of 1946 until your mother-in-law's death in November of 1950, did you and your wife visit her in the evening? A I can't say how many times.

Q Can't you approximate it?

* * * *

275 Q Between October of 1946 and November of 1950? A November of 1950? I would say about two dozen times.

Q About twenty-four times? A About twenty-four times.

Q In that period? A Yes.

Q An average of six times a year? A That is right.

Q Directing your attention to the one occasion that you mentioned, the Saturday before her death, you say Mr. McClellan himself complained to you that she was drinking too much? A That is right.

Q It was on that occasion he told you she had written a number of checks for liquor? A Seventeen checks.

* * * *

Q How many times from the time of her fall in the summer of 1950 until her death in November, 1950, did you and your wife visit her in the evening? A In 276 the fall of 1950?

Q From the summer of 1950 to the fall of 1950?

A About three or four times.

Q And were you aware of the fact that Mr. McClellan had employed a nurse to take care of her in the daytime?

A I saw a nurse there.

Q Do you know her name? A Louise Gilbert.

Q Did you also see another nurse? A No, sir.

Q Do you know of a Mrs. Canty, Cora Mae Canty?

A No, sir.

* * * *

Q Mr. Newby, you say that on these several visits, Mr. McClellan would offer you a highball, and you declined? A Yes, sir.

Q You declined on every occasion? A Yes, 277 sir.

Q You are what is known as a teetotaler, are you not? A No, sir.

Q Do you indulge in alcohol yourself? A I take a drink of wine every now and then.

Q A drink of wine? A That is right.

Q Nothing stronger than wine? A That is right.

Q Do you have any objection to friends and acquaintances of yours indulging in alcoholic beverages? A No, sir.

Q You are not pretty much against anyone who does so? A No, sir.

* * * *

Q Mr. Newby, did you know that among these checks that Mr. McClellan had told you about, there were two within the month prior to her death that were cashed by your wife? I will show you Exhibits Nos. 6 and 5, bearing your residence address in the lower left-hand cor-

ner, cashed at the Safeway Store on Brookeville Road in Chevy Chase Maryland. That is the store where
 278 you deal, is it not? A I notice one that is on my daughter's birthday. Yes.

Q So that two of these checks Mr. McClellan was speaking about were cashed by your wife? A Yes, sir.

* * * *

Q I will show you this check dated October 4, 1950, signed Anne G. McClellan, and ask you if you can identify the endorsement on the rear side of that check? A Looks like my brother-in-law's endorsement.

Q Marshall M. Morgan, Jr.? A Yes, sir.

Q I will show you this check dated October 9, 1950, in the amount of \$35.00, and ask you if you can identify the endorsement on the rear side of that check? A My brother-in-law.

Q That is your brother-in-law. I show you a check dated November 13, 1950, signed by Anne G. McClellan. Can you identify the payee on that check?

* * * *

A Higgins Drug Store.

* * * *

279 MR. DAVIS: I offer these three exhibits at this time, if the Court please, as Defendant's Exhibits 10-A, B and C, being checks written by the decedent in the two or three weeks period immediately preceding her death.

* * * *

281 THE COURT: I know that. So I will reserve ruling on the admissibility of the checks until it be shown that which will make them admissible. But they were marked for identification. Does that complete your examination?

* * * *

Redirect Examination

* * * *

Q On your cross-examination you were asked about whether you and your wife paid rent, and I believe you testified to the effect that the understanding was that you were to pay for the household expenses and the maid services.

Now, in addition to that, will you state, during the years you were there with your mother-in-law, what if any other thing you did in the way of assisting in bearing the expenses of the household? A I did the chores around the house, kept the property going. I painted the house on two occasions. And after the separation in 1932 and the purchase of the house at 3218 in June of 1932, the arrangement was that we would provide all the food, maid service and utilities. And that is clearly of record in our bank statements, where all my salary checks were deposited and all the checks in payment of those amounts were drawn by my wife.

Q And did you buy an oil heater for one of the houses? A For 3218, in 1937 we replaced the coal burner with an oil burner.

* * * *

283 Q What became of your money and salary during the time you were living in the home with Mrs. Morgan? A For my expenses going to the office, and lunches. Outside of that, all of it went into those houses.

Q And the expenses of living there? A That is right.

* * * *

Recross-Examination

* * * *

284 Q In 1923, Mr. Newby, when you first went to live with your mother-in-law, what was your Government salary? A It was around about twenty-four

hundred. I was the (American) secretary of the Mixed Claims Commission in the State Department.

Q What is your present salary? A Eight thousand.

285 Q Eight thousand. What was your salary in 1941 when you left your mother-in-law? A Forty-eight hundred.

Q Forty-eight hundred. And while you were living at 3216, you say you did the chores around the house? A I did.

Q That is no more than you would do if you owned your own home? A That is right.

Q You painted the house during 1932? A During that time I painted it twice.

Q Did you keep a record of how much the paint cost you? A No, sir.

Q You painted it in your off hours? A I did.

Q In your spare time? A Yes, sir.

Q When you converted the coal burner in 1937 from coal to fuel oil, how much did that burner cost you? A I don't know. I have the final check to pay for it.

Q If that will refresh your memory, let us have it. A It was a little over \$139, I believe.

Q \$139.00? A \$135.86.

286 Q And how much did the paint cost you for the house on the two occasions you painted it? A I don't recall.

Q Give us an approximation? A Well, paint runs about \$4.50 a gallon, and this is a stucco house with framing—brick house with framing.

Q You just painted the framing work, is that what you mean? A That is right.

Q You didn't paint the brick or stucco? A No.

Q How many gallons would it take to paint the trim? A About a gallon.

Q You painted it twice, so it cost you about nine dollars for the paint? A That is right.

Q Aside from that, your agreement, as you expressed it, was to buy all the food, pay the utilities, meaning the telephone, light and gas, and pay for the maid service?

A That is right.

Q There is some testimony that during the time you lived with your mother-in-law, she did very little eating, she did mainly drinking. You didn't buy her whiskey, did you? A No, sir.

* * * *

287 Q Well, during that period, Mr. Newby, it took practically your entire salary to feed and clothe a family of four, did it not? A Yes, sir.

Q Now, when you bought your home on East-West Highway, did you pay cash for it? A No, sir.

Q What was your down payment? A Fourteen hundred.

Q What was the total sale or purchase price of that house? A Eighty-seven fifty.

Q Eighty-seven-fifty. You paid fourteen hundred down and financed the balance? A Borrowed it on my insurance policy.

* * * *

294 At the close of the direct testimony of the aforementioned witness, the following proceedings were had, as follows:

MR. DAVIS: If the Court please, I move at this time to strike all of Dr. Marland's testimony, for the reason that it is attempted indirectly, by way of a hypothetical question, to get before the Court and Jury the opinion of a medical man, in this case a psychiatrist, who, by his own admission, has never seen Anne G. McClellan and knew nothing of her until he was called upon to testify in this case as a professional witness.

* * * *

296 THE COURT: This witness is under absolutely no privilege to the deceased. He was qualified as

an expert, and has been asked a hypothetical question the objections to which I overruled, and I now deny the motion to strike. They are exactly the same thing.

MR. DAVIS: Very well.

MR. McCANN: The plaintiff rests.

THE COURT: Do you want to cross-examine?

MR. DAVIS: I most certainly do.

* * * *

2

Dr. Albert E. Marland

* * * *

Direct Examination

BY MR. McCANN:

Q Doctor, will you please state your full name and your office address? A Albert E. Marland, M-a-r-l-a-n-d; 1216 - 16th Street, Northwest.

MR. DAVIS: If the Court please, in the interest of time, I will stipulate Dr. Marland's qualifications. I have known Dr. Marland professionally.

THE COURT: His qualifications being conceded, I would not labor the point.

MR. McCANN: I am not going to labor them, but I would like to ask two or three questions, which he can answer very briefly, to show his background in this particular subject.

THE COURT: All right.

3 Q (By Mr. McCann) Doctor, what field have you specialized in? A Psychiatry.

Q What experience have you had in the treatment of alcoholics? A I have treated alcoholics since before I graduated in 1919, while at Gallinger as a student intern, and subsequently I have seen them on the Mental Health Commission, and seen a great number of them at St. Elizabeth Hospital. I have treated them in my private practice for a good many years.

Q Doctor, will you state what effect alcohol has on the body and mind of a person it is used continuously?

MR. DAVIS: I object, if the Court please. In fact, I will be willing to stipulate with counsel that the continued use of alcohol will affect anybody's mind and body. But the test in this case is in what degree and to what extent did it affect Anne G. McClellan on or about November 1, 1946.

THE COURT: Well, I suppose that the question is leading in the direction. I don't know. This is certainly a preliminary question.

MR. McCANN: It is preliminary.

THE COURT: It couldn't be a completely hypothetical one.

MR. DAVIS: I object to the question because of the general nature, because of the fact that Dr. Marland by counsel's own statement has never seen this deceased, and because a dissertation on the bad or good effects of alcohol I do not believe will aid the Court or the Jury in deciding the issue in this case.

THE COURT: I think your objection might be well taken when the appropriate hypothetical question is posed, but I think this is purely a preliminary question.

BY MR. McCANN:

Q Proceed, Doctor. A Physically, alcohol is,—to start with, alcohol is classed among the narcotics, and it affects nerve tissue very considerably, disturbing acutely, of course, the coordination, and paralyzing the various mental faculties. Starting with those highest first, that is, those of a moral and ethical nature, some people under the influence of alcohol do things they would not do otherwise. It becomes progressively worse with continued use, so that finally, of course, we have the paralyzing effect of alcohol, chronic disturbances of coordination, injury to nerves, disturbance of nutrition, and sometimes brain damage.

Acutely, there may be acute alcoholic poisoning, coma, alcoholic hallucinations, delirium tremens, which is a much more severe sort of hallucinosis, and occurs usually only after about eight years of severe and continued drinking as a minimum.

5 In addition to that, we have the alcoholic paranoid state, in which there are ideas of suspicion, and delusions of persecution, and subsequently, of course, the alcoholic deterioration, because alcoholism is a flight from reality and a means of preventing the individual from striving for the things that people frequently live for and work for.

There is a continuing deterioration of the personality itself, and a lack of ability to make judgments and concentrate and to perform the acts which normally you would be able to do. This may proceed to the point where there is complete incapacity of every sort.

Q What organs of the body does alcoholism particularly affect? A Alcohol apparently robs the body of its Vitamin B complex, that is, some of the B group; consequently the body needs a great deal more than when a person is not drinking, and if that is not supplied in the diet, there are serious nerve deteriorations.

Also, depending more or less upon—for the same reason, there is a chronic intoxication of the liver cells, so we have the picture of hardening of the liver, cirrhosis of the liver, with impairment of circulation, blood accumulating in the abdomen, and so on.

Q What effect does it have on the brain with respect to moisture, or liquid? A Well, the wet brain of
6 the alcoholic is usually due to fairly acute intoxication, or drinking in large amounts, and there is quite an accumulation of fluid when the skull is opened, as the brain is saturated with moisture, as it were. Of course the patient just prior to that time has been completely mentally disabled for some time.

Q Doctor, were you ever acquainted with Anne G. McClellan, deceased? A No.

Q Doctor, assume that the deceased, Anne G. McClellan, was a refined woman; that for over twenty years after her marriage she was a charming wife, a considerate mother, and a very popular hostess, with a wide circle of friends; that she suffered a serious operation about 1932, and was separated from her husband, who divorced her in 1934; that she became despondent and began to drink alcoholic beverages immoderately in 1932, and to excess in 1934; at which time she began to ignore food, and to withdraw from her friends;

In 1934 she became prejudiced without reason against her son-in-law, with whom she had formerly been friendly for eleven years; she began to glare and to stare at him with animosity;

She continued to drink to excess until 1941, by which time she had alienated most of her old friends and had become a lonely recluse; by 1941 her animus toward her son-in-law had increased to such an extent that she
7 frequently referred to him in conversations with her daughter, Mrs. Newby, as "that bull-headed Dutchman" and "that God-damn son-of-a-bitch";

By 1941 she had developed a marked antagonism toward her little grand-daughter, Jane, who was a sickly child: would constantly criticize and pick on her, and sometimes strike her, and on occasions would scare the child by waking her up at night and saying to her: "You don't love your Nanny, do you?" and having arguments with her;

That on many occasions she threatened or attempted to commit suicide; she created all sorts of theatrical situations to attract attention, such as rolling her eyes and throwing up her hands as if she were going to faint or fall, when there was no immediate reason for such actions:

That at times she would stay in bed for days, refusing food and drinking liquor; that before Mrs. Newby and her family moved from Klinge Road on December 1, 1941, her mother was confined in a rest home and in 1942 she was confined in an institution for alcoholics because of her excessive drinking;

That from 1941 on to her death on November 21, 1950, Mrs. McClellan was in a mental fog from the excessive and continuing use of whiskey; she had ataxia, which made her walk with an unsteady, shuffling gait, and frequently fell while intoxicated; her speech throughout these years was thick; her memory so poor that she would repeat the same stories at intervals of only a few minutes; and her mental faculties were so dulled by alcohol that she would do things such as putting her eye glasses into the refrigerator;

She continued to drink to excess until October 19, 1946, when she married Alfred D. McClellan, a roomer who had been living in the home with her since the fall of 1945; she continued to drink to excess until November 1, 1946, when she executed a will, leaving her home at 3218 Klinge Road, Washington, D. C., to Mr. McClellan;

Now, assuming, Doctor, the foregoing to be true, do you have an opinion as to whether the said Anne G. McClellan was of sound and disposing mind and memory or in any respect capable of executing a will on November 1, 1946, when she executed said will?

MR. DAVIS: I object.

THE COURT: Well, that is the hypothetical question. All right. Now, what is the objection?

MR. DAVIS: It is a hypothetical argument, if the Court please, and it doesn't embrace all of the evidence. He mentioned—I noticed the very last part he mentioned the will, that she executed a will leaving her home to Mr. McClellan, said nothing about the same will leaving the house to Mrs. Newby, nor the legacy to her son.

9 It is predicated on facts in argument, as well as facts in testimony, and certainly does not embrace the actual evidence of the caveator herself. I notice counsel framed the question that she had started the excessive use of alcohol in 1934. That is contrary to the very testimony of the witness, Mary Semley. It is contrary to the testimony of the (husband), who said that didn't occur until 1941.

As I say, it does not take into consideration all of the facts in evidence, or which will be in evidence, if Your Honor does not direct a verdict in this case. I think coming now, with only one side of the case in, the doctor having heard none of the evidence, the question being put in the form of a hypothetical argument—

THE COURT: The hypothetical question doesn't have to be based on evidence that might be put in by other parties or other witnesses, it can be based on evidence in the case. You are correct if you say it is not permissible if it doesn't correctly state evidence upon which it is predicated, because it must do that. In your cross-examination, of course, you could ask him to assume certain things, too, that are different. But I am concerned only now with whether or not the hypothetical question assumes any matters as to which there is not any evidence in the case.

MR. DAVIS: Yes, I think it does.

THE COURT: If it does, it is not a proper question.

10 If there is evidence upon which it can be predicated, then it is all right.

MR. DAVIS: There is no evidence in the case so far that the deceased underwent a serious operation in 1932.

THE COURT: Well, now, let us stop right there. Is there no evidence of that?

MR. McCANN: Certainly there is, Your Honor. There was the evidence given by Mrs. Newby to the effect that there was.

MR. DAVIS: I thought she had some female organs removed at some time.

MR. McCANN: That is right.

MR. DAVIS: Is that serious? There is no evidence it was serious. It happens every day—a hysterectomy.

THE COURT: Oh, I see what you mean—describe the operation, then, instead of calling it serious.

MR. McCANN: If he prefers to have that called a hysterectomy, I will do that.

MR. DAVIS: I don't know whether it was or was not. There is no medical evidence in the case.

THE COURT: No. There is evidence—

MR. DAVIS: She was operated on for the removal of female organs. The daughter at that time in 1932 was a little girl.

THE COURT: We are not talking about the credibility of witnesses. We are talking about what evidence there is in the case on which the question can be based.

MR. DAVIS: I have heard no evidence of any serious operation in 1932.

MR. McCANN: There was testimony. I am sure the Court recalls it.

THE COURT: I recall the testimony: I am not certain Mr. Davis isn't right when he says there was testimony it was an operation for female trouble.

MR. McCANN: We will change it, may it please the Court, to an operation for female troubles.

THE COURT: All right.

MR. DAVIS: I have heard no testimony that as the result of her animosity against the son-in-law, she glared and stared at him.

THE COURT: Wait a minute. Let us check on that right now. Mr. McCann, do you recall any evidence of glaring and staring?

MR. McCANN: I think so, Your Honor. I believe that is in the record.

THE COURT: Well, we will have to find out.

MR. McCANN: But I will leave it out if there is any question about it, if the Court does not recall it.

THE COURT: I recall the evidence as well as I can, but I don't express any certainty as to my recollection about certain things. I may be certain as to others.
12 Do you want to strike that out, about the glaring and staring?

MR. McCANN: Yes, sir. We will strike that out.

THE COURT: What is next?

MR. DAVIS: I have heard no evidence so far in this case that in 1941 Anne G. McClellan had become a lonely old recluse.

MR. McCANN: I think there was ample testimony that the woman had become a recluse, that she had lost most of her friends by that time.

THE COURT: Well, that is true. There is testimony here about two of her friends stopping in to see her, or something of the kind, that she had many before. There was testimony she stayed in her room a good part of the time. I do not recall the term "recluse" being used.

MR. McCANN: And had become lonely. We will cut out "a recluse".

THE COURT: I think there is testimony of that.

MR. DAVIS: That is the very year, digressing for a moment, Mrs. Newby moved to Chevy Chase, in 1941. How would she know what friends came to visit her?

THE COURT: Again, I will not argue the credibility of witnesses, Mr. Davis. That does not lie with the Court.

MR. DAVIS: But there has to be some testimony, credible testimony. There has to be some testimony before the jury they can consider. There is no testi-
13 mony that in 1941 and from then on up to the marriage with Mr. McClellan, that Mrs. McClellan was a lonely old recluse.

MR. McCANN: I have cut out "recluse", and have said she became lonely.

THE COURT: I think there is evidence to support loneliness.

MR. DAVIS: There is no testimony that Mrs. McClellan engaged in all sorts of theatricals, and Your Honor sustained my objection to the word "theatricals". You didn't know what was coming yourself.

THE COURT: I didn't.

MR. DAVIS: He injected the additional word.

THE COURT: Mr. McCann just likes the term "theatrical. It did come out in evidence what she did, and that is what he calls theatrical. But I believe I would omit your own adjectival predilection, Mr. McCann, and say what the witness said.

MR. McCANN: That she created all sorts of situations, and we will cut out "theatricals."

MR. DAVIS: I haven't heard any evidence of all sorts of situations.

MR. McCANN: Such as rolling her eyes and throwing up her hands. That was in the testimony.

THE COURT: There was testimony to that. Let's strike out the "all sorts".

14 MR. McCANN: All right. "All sorts" will go out.

MR. DAVIS: Outside of the testimony of Mr. Newby, who is a wine drinker, and the characterization of the daughter, who apparently is likewise a wine drinker, there has been no evidence of Mrs. McClellan's excessive use of whiskey. And that, after all, is a matter of opinion.

THE COURT: Yes, it is a matter of opinion, I guess, but I think there is evidence upon which at least a rather generous use of intoxicating beverages has been testified to.

MR. DAVIS: Likewise, there is no evidence that for days on end, as the question concludes, that she laid in her bed and refused food.

THE COURT: I don't know about the days on end.

MR. McCANN: Well, the days on end,—perhaps my language may be moderated a bit.

THE COURT: I think so.

MR. McCANN: (To Mr. Dorsey:) What line is that on? Have you got it? I am trying to find that.

MR. DORSEY: (Indicating) Here it is.

MR. McCANN: That at times she would stay in bed for days. I don't say "days on end", Your Honor.

THE COURT: "Days on end" is not in it?

MR. DAVIS: There is no testimony she stayed in bed for days.

MR. McCANN: Yes, there is. There is testimony she stayed in bed at times for days without food. That testimony was in by Mrs. Newby. And I am confident that there was some testimony to that effect by the nephew with respect to the experience down in New Mexico, if I am not in error.

THE COURT: That was one occasion she had too much beer.

MR. McCANN: When there was no immediate reason for such action; that at times she would stay in bed for days, refuse food and drink liquor. I think we have testimony in the record to that effect.

THE COURT: I think there is some testimony along that line, not days on end, but I think there is testimony she did for a period of days stay in bed.

MR. DAVIS: If the Court please, I object to it for the further reason—the entire question—because this has been an attempt to create a syllabus, or a resume, of a period in this deceased woman's life, dating back some twenty years.

THE COURT: Yes.

MR. DAVIS: And it is certainly immaterial to the matter of testamentary capacity, or lack of it, at our about November 1, 1946.

THE COURT: I have already ruled on that, Mr. Davis. I have ruled that evidence of antecedent matters may be put in evidence for the purpose, and for
 16 the only purpose, of determining the state of mind, or testamentary capacity, at the critical time here involved in the suit. So that same ruling would apply to this question.

MR. McCANN: May it please the Court, while I am confident I am correct that the testimony does show that she stayed in bed for days at times, without eating food, I want to strike that, at times she would stay in bed, refusing food and drinking liquor.

THE COURT: That will cut out any question about it, because there definitely was testimony to that effect.

MR. DAVIS: May the record show my further objection, if the Court please, to any opinion by Doctor Marland upon the subject of the hypothetical question, for the simple reason that it invades the province of this jury, who are to form their own opinion from the evidence they have heard, of the testamentary capacity, or lack of it, of Anne G. McClellan?

THE COURT: From time immemorial, hypothetical questions have been permitted of expert witnesses based on testimony that has been given in a case, and that is what this is supposed to be. I will overrule that objection. Now, you had better read the question as it has been revised.

MR. McCANN: Yes, sir.

BY MR. McCANN:

Q Doctor, assume that the deceased, Anne G. McClellan, was a refined woman; that for over twenty
 17 years she was a charming wife, a considerate mother, and a very popular hostess, with a wide circle of friends; that she suffered an operation for female trouble about 1932, and was separated from her husband, who divorced her in 1934; that she became despondent and began to drink alcoholic beverages immod-

erately in 1932, and to excess in 1934, at which time she began to ignore food, and to withdraw from her friends;

In 1934 she became prejudiced without reason against her son-in-law, with whom she had formerly been friendly for eleven years; she continued to drink until 1941, by which time she had alienated most of her old friends, and had become lonely; by 1941 her animus toward her son-in-law had increased to such an extent that she frequently referred to him in conversations with the daughter, Mrs. Virginia Newby, as "that bull-headed Dutchman" and "that God-damn son-of-a-bitch";

By 1941 she had developed a marked antagonism toward her little grand-daughter, Jane, who was a sickly child, and would constantly criticize and pick on her; and sometimes would scare the child by waking her up at night and saying to her "You don't love your Nanny, do you?" and having arguments with her;

That on many occasions she threatened or attempted to commit suicide; she created situations to attract attention, such as rolling her eyes and throwing up her hands

as if she were going to faint and fall when there
18 was no immediate reason for such actions; that at times she would stay in bed, refuse food and drink liquor; that before Mrs. Newby and her family moved from Klinge Road on December 1, 1941, her mother was confined in a rest home and in 1942 she was confined in an institution for alcoholics because of her excessive drinking:

That from 1941 on to her death on November 21, 1950, Mrs. McClellan was in a mental fog from the excessive and continuing use of whiskey; she had ataxia, which made her walk with an unsteady, shuffling gait, and frequently fell while intoxicated; her speech throughout these years was thick; her memory so poor that she would repeat the same stories at intervals of only a few minutes; and her mental faculties were so dulled by alco-

hol that she would do things such as putting her eye glasses into the refrigerator;

She continued to drink to excess until October 19, 1946, when she married Alfred D. McClellan, a roomer who had been living in the home with her since the fall of 1945; she continued to drink to excess until November 1, 1946, when she executed a will, leaving her home at 3218 Klinge Road, Washington, D. C., to Mr. McClellan;

Now, Doctor, assuming the foregoing to be true, do you have an opinion as to whether the said Anne G. McClellan was of sound and disposing mind and memory, or in any respect capable of making a will on November 1, 1946, when she executed said will?

MR. DAVIS: I object.

THE COURT: Well, you did object. Have you a further objection?

MR. DAVIS: This is a new question, if the Court please, and I object to it now, for the reason that the statement inclusive in the question that Mrs. McClellan became prejudiced without reason against her son-in-law, is certainly not based on the evidence. That is the son-in-law's conclusion. She may have had a perfectly good reason, by reason of the fact there was free loading on her for some eleven years. That doesn't make it a prejudice without reason.

There is no evidence she was confined in any institution for alcoholism. In fact, the evidence is the opposite, that she went there voluntarily, signed herself in the two places, one in the '30's and one in 1942—Greenhill, ten days on each occasion, and ostensibly signed herself out. That is not confinement.

There is no evidence she was in a mental fog from 1942 until 1950. She was on occasion, according to the witness, but not in a continuous mental fog.

There is no evidence her speech was thick throughout these years, embracing the full twenty year period.

I respectfully submit, if the Court please, it is another reiterated argument on all of the testimony
20 in this three day trial.

THE COURT: It is hardly fair to the Court to not make your objections at one time, so the Court can consider and act on them. I thought you had completed your objections a moment ago. You gave every indication that you had.

Now, I don't want to disregard any proper objection, even though it is not made timely. So we will take up again, one at a time, what you have just said, and we will go over it, and see if there is any evidence to support it. But I hope this time finishes it, and you will have voiced all the objections you have, so the Court can rule.

MR. DAVIS: The usual practice, in every medical case I have been involved in, which calls for a hypothetical question, has been for counsel to submit a copy of the question, especially a two page question which my opponent has, and not expect me to memorize it in the short time it takes to read it, as he has read it. He can't propound it orally.

THE COURT: It is done both ways. I have seen hypothetical questions exchanged. I have also seen them handled as we are handling it now. If you want me to take a recess, so you can study the thing, I will do that. But I do want you to finally state what your objection is, and not have a repetition of objections to the question.

MR. DAVIS: Well, I object. I have just stated that the amended question as now read, is not predi-
41 cated upon the evidence in the case.

THE COURT: All right. Let us take up the different matters you have stated now, and see if there is evidence to support them. What is the first objection?

MR. McCANN: I will have to have him (the Reporter) read the objections, because I can't recall.

THE COURT: All right. Let us do it that way, Mr. McCann.

(Thereupon, the Reporter read the part of Mr. Davis' objection, as follows:

"This is a new question, if the Court please, and I object to it now, for the reason that the statement inclusive in the question that Mrs. McClellan became prejudiced without reason against her son-in-law, is certainly not based on the evidence. That is the son-in-law's conclusion. She may have had a perfectly good reason, by reason of the fact that there was free loading on her for some eleven years. That doesn't make it a prejudice without reason.")

MR. McCANN: The wife testified they got along beautifully for eleven years, that there was absolutely the most cordial relationship between them until this heavy drinking started in 1934, and that there was no reason for the fact that her mother began this attitude.

THE COURT: I think the son-in-law testified
22 substantially that way, too.

MR. McCANN: That is right.

THE COURT: That it was only when she was drinking that she showed this animus and apologized afterwards. I will overrule that objection. What is the next one?

(Thereupon, the Reporter read the part of Mr. Davis' objection, as follows:

"There is no evidence she was confined in any institution for alcoholism. In fact, the evidence is the opposite, that she went there voluntarily, signed herself in the two places, one in the '30's and one in 1942—Greenhill, ten days on each occasion, and ostensibly signed herself out. That is not confinement.")

THE COURT: I think if the term "confined" carries the connotation that she was forcibly put there, or under some legal restraint, the objection is well taken. I

thought of that when you used the term. It doesn't necessarily mean that. I mean, one can be confined to bed without being forcibly kept there, but I think I would clarify it.

MR. McCANN: May we say her mother was in a rest home?

THE COURT: That is right. I think that would be freer from any misunderstanding.

MR. McCANN: "And in 1941 she was in an institution." I have no desire to use any words anyone may object to.

* * * *

23 THE COURT: Well, he may be proper in putting that connotation on it, though I do not.

(Thereupon, the Reporter read the part of Mr. Davis' objection, as follows:

"There is no evidence she was in a mental fog from 1942 until 1950. She was on occasion, according to the witness, but not in a continuous mental fog.")

THE COURT: I think he is right on that, Mr. McCann. In fact, the daughter said she made a point of going to her in the mornings to see her before she—

MR. McCANN: Had gotten drunk.

THE COURT: Yes.

MR. McCANN: She talked to her when she woke up in the mornings. That doesn't mean—

THE COURT: I don't know what it means, but I think the language is broad, as Mr. Davis says it is.

MR. McCANN: I will make this change, that from 1941 until her death on November 21, 1950, Mrs. McClellan was usually in a mental fog.

THE COURT: Well, I don't know about "usually", either, but—

MR. McCANN: Well, I think that the word "usually" is warranted from all of her testimony.

THE COURT: I am trying to relate it to what the evidence was.

24 MR. McCANN: I am trying to, too, Your Honor.

THE COURT: That is what it should be related to.

MR. McCANN: Well, can we avoid the objection by saying "was quite often in a mental fog"?

THE COURT: Yes.

MR. McCANN: All right.

(Thereupon, the Reporter read the part of Mr. Davis' objection, as follows:

"There is no evidence her speech was thick throughout these years, embracing the full twenty year period."

THE COURT: What is your statement on that? I am inclined to agree with Mr. Davis on his statement there, but I don't know what your statement in the question is.

MR. McCANN: The statement in the question is that she had ataxia, which made her walk with an unsteady, shuffling gait, and frequently fell while intoxicated; her speech throughout these years was thick. . . ." If I may cure that by saying was "frequently thick", so as to cure that.

THE COURT: All right. Is that the last objection?

THE REPORTER: Yes, sir.

THE COURT: The rulings of the Court have been indicated. Read the question as modified, and the witness will answer it.

BY MR. McCANN:

25 Q Doctor, assume that the deceased, Anne G. McClellan, was a refined woman; that for over twenty years after her marriage she was a charming wife, a considerate mother, and a very popular hostess, with a wide circle of friends; that she suffered an operation for female trouble about 1932, and was separated from her husband, who divorced her in 1934; that she became despondent and began to drink alcoholic

beverages immoderately in 1932 and to excess in 1934, at which time she began to ignore food, and to withdraw from her friends;

In 1934 she became prejudiced without reason against her son-in-law, with whom she had formerly been friendly for eleven years: she continued to drink to excess until 1941, by which time she had alienated most of her old friends and had become lonely;

By 1941 her animus toward her son-in-law had increased to such an extent that she frequently referred to him in conversations with her daughter, Mrs. Newby, as "That bull-headed Dutchman" and "That God-damn son-of-a-bitch";

By 1941 she had developed a marked antagonism toward her little grand-daughter, Jane, who was a sickly child, and would constantly criticize her and pick on her, and sometimes strike her, and on occasions would scare the child by waking her up at night and saying to her: "You don't love your Nanny, do you?" and having arguments with her;

That on many occasions she threatened or attempted to commit suicide; she created situations to attract attention, such as rolling her eyes and throwing up her hands as if she were going to faint or fall, when there was no immediate reason for such actions;

That at times she would stay in bed, refusing food and drinking liquor; that before Mrs. Newby and her family moved from Klinge Road on December 1, 1941, her mother was in a rest home and in 1942 she was in an institution for alcoholics because of her excessive drinking;

That from 1941 to her death on November 21, 1950, Mrs. McClellan was quite often in a mental fog from the excessive and continuing use of whiskey; she had ataxia, which made her walk with an unsteady, shuffling gait, and frequently fell while intoxicated; her speech through-

out these years was frequently thick; her memory so poor that she would repeat the same stories at intervals of only a few minutes, and her mental faculties were so dulled by alcohol that she would do things such as putting her eyeglasses into the refrigerator;

That she continued to drink to excess until October 19, 1946, when she married Alfred D. McClellan, a roomer who had been living in the house with her since the fall of 1945; she continued to drink to excess until November 1, 1946, when she made a will leaving her home at 3218 Klingle Road, Washington, D. C., to Mr. McClellan;

Now, Doctor, assuming the foregoing to be true, 27 do you have an opinion as to whether the said

Anne G. McClellan was of sound and disposing mind and memory, or in any respect capable of making a will on November 1, 1946, when she executed said will?

MR. DAVIS: I object.

THE COURT: Well, I have overruled your objection. I mean, I have overruled it insofar as I have not directed modification of the question.

THE WITNESS: I do have an opinion, conditionally.

BY MR. McCANN:

Q Will you state what your opinion would be conditionally? A There is no question that this individual has experienced some severe alcoholic deterioration of long continued drinking through the years. She shows evidence of increasing physical inability, ataxia, for instance, and apparently there has been,—from the statement there has been paranoid changes, that is, ideas of suspicion, and probably based upon distortions of rather ordinary affairs. She has unquestionably had at times sufficient alcohol so that she did not know what she was doing.

If the alcohol was continued in such a degree, that is, the intake of alcohol was continued in such a degree that

it was practically continuous, under those conditions I would say she was not of disposing mind.

28 If, on the contrary, there were periods of abstinence, and after these periods of abstinence she actually regained a great deal of her mental ability, under those circumstances she would be of disposing mind.

It would depend to some degree upon how serious the actual deterioration was. In other words, it is not always reversible. Mere cessation of alcohol after the more severe changes have taken place would not mean that she should recover sufficiently to be of disposing mind. But if it had not reached that point, then I can believe she would be of disposing mind.

Q Doctor, would such a person be more susceptible to suggestions made by one upon whom she was dependent for alcohol, than people of ordinary minds?

MR. DAVIS: I object. We have evidence here that this deceased was susceptible and dependent upon at least four people for alcohol,—the nurse who has not been produced, her son, who has not been produced, who cashed checks for her as well as her husband, and as well as the daughter, who came in in the morning when she could find her sober.

THE COURT: Well, the question, as I understand it, does not relate to her husband particularly. He said anyone upon whom she was dependent for alcohol.

MR. DAVIS: She is charging undue influence against the husband.

29 THE COURT: That is right.

MR. DAVIS: The question is immaterial. The answer is not binding upon the caveatee.

THE COURT: I will let the Doctor answer it if he can. You understand the question, don't you, Doctor?

THE WITNESS: Yes. I think I can answer that. I said in the beginning that alcohol is in its effects a narcotic. It is perfectly obvious, of course, when we have drugs, such as opiates, a patient can be persuaded to do

almost anything to secure them. Of course, alcohol doesn't create such a severe dependency, but as alcoholism continues there is a very definite dependency upon alcohol, and people can much more easily than normal, than the average individual, be persuaded to do things they would not do otherwise. That, I think, answers the question.

MR. McCANN: That is all, Your Honor.

MR. DAVIS: If the Court please, I move at this time to strike all of Dr. Marland's testimony, for the reason that it is attempted indirectly, by way of a hypothetical question, to get before the Court and Jury the opinion of a medical man, in this case a psychiatrist, who, by his own admission, has never seen Anne G. McClellan and knew nothing of her until he was called upon to testify in this case as a professional witness.

Our United States Court of Appeals on at least 30 two occasions of (reverse) situations, have had occasion to rule out medical testimony.

In the first case, the case of (Lobofish), 60 Appeals, at page 398, the caveatee, who in that case would resemble the husband, the nominated executor of the will, and the qualified executor of the will, attempted to offer the attending physician—

THE COURT: That was excluded on the ground of privilege, Mr. Davis.

MR. DAVIS: On the ground of privilege.

THE COURT: This isn't privileged.

MR. DAVIS: In the other case the caveator attempted to get in evidence of a medical man who had attended the deceased, and that same evidence was excluded, not only on the ground of privilege, but on the ground that it was too remote.

THE COURT: It was excluded on the ground of privilege, too, was it not?

MR. DAVIS: If we can't produce a medical man who attended this person, under the decisions in the

Court of Appeals, I submit this attempt to get in indirectly the opinion of a medical man who has never seen the deceased, is certainly improper.

THE COURT: This witness is under absolutely no privilege to the deceased. He was qualified as an expert, and has been asked a hypothetical question, the
31 objections to which I overruled, and I now deny the motion to strike. They are exactly the same thing.

MR. DAVIS: Very well.

* * * *

Cross Examination

* * * *

Q Doctor Marland, who retained you to testify in this case? A Mr. McCann and Mr. Dorsey, the attorneys here.

Q Have you been promised any consideration in exchange for your testimony? A I have been promised a fee for my testimony.

Q How much is your fee? A There is no agreement.

Q No agreement as to amount? A I have no responsibility in the outcome of the case, it is understood.

Q You haven't any definite agreement as to amount? A No. There was to be a conference between attorneys, but I understand this matter came up rather rapidly, so there was no conference about the fee. Usually, there is.

* * * *

37 Q Have you seen other individuals who have taken a similar amount of alcohol and have what we may call a crying jag, go off in a corner to themselves? A Yes. Alcohol affects different people differently. It unleashes certain of the basic personality elements, and, of course, people vary.

Q Then you have the solo drinkers who may go off in a cocktail lounge and drink two or three fifths and not mind it if he has been through a tragedy? A Yes. Usually the more serious type of drinker is a solo drinker.

Q With such an individual, as you have expressed your opinion in answer to the hypothetical question propounded by Mr. McCann—would such an individual have lucid moments? A I tried to distinguish in my answer. As I say, it depends on many factors,—whether there was a continued intake of alcohol sufficient to keep the mind blunted; if there was that continued amount, no matter how well the body handled it, if the amount was large enough, the person could stay out, as it were, not necessarily for any particular length of time, but to the point where they weren't able to think lucidly. If the alcohol intake dropped below that point, long enough, yes, the individual could have lucid intervals, providing there hadn't been too great deterioration at that time.

Q And during such lucid moments, would such a person be perfectly competent to make a will, contract, or deed? A That is true.

Q I believe you qualified your opinion by saying you would not be able to say how serious the actual deterioration of the nerve cells, and so on, was? A There were not enough facts in the question for me to base an opinion on that.

* * * *

MR. McCANN: The Plaintiff rests.

* * * *

MR. DAVIS: Do I understand the Plaintiff is not going to make any further attempt to obtain the witness he stated at the Noon recess he was?

* * *

298 MR. McCANN: We will try to get her, if we can. We will try to get her and use her as a rebuttal witness if we don't find her over-night.

THE COURT: Does that answer the question?

MR. DAVIS: Yes. But I want to know if the plaintiff definitely rests, because if that statement is in the record, that the plaintiff definitely rests, then I desire to make a motion.

* * *

299 MR. DAVIS: I move at this time, if it please the Court, for a directed verdict in favor of the Caveatee on all of the issues framed by the order of this Court which brought this matter to trial.

* * *

306 THE COURT: Let me say I deny the motion at this time without prejudice to its renewal at the conclusion of all the evidence.

* * *

309 *Lillie Converse Yelverton*

* * *

Direct Examination

BY MR. DAVIS:

Q Mrs. Yelverton, will you state your full name?

A Lillie Converse Yelverton.

Q Where do you live?

* * *

A 1315 30th Street.

Q Northwest? A Northwest.

Q What is your occupation, Mrs. Yelverton? A Clerk, in the Government.

Q What branch of the Government are you employed in? A R. F. C.

310 Q The R. F. C. How long have you been with the Federal Government? A Nearly 17 years.

Q Is it Miss, or Mrs. Yelverton? A Mrs.

Q You are a widow, I take it? A Yes.

Q Did you know the late Anne G. McClellan, who died in November of last year? A Yes.

Q Prior to the time of her death, how long had you known Mrs. McClellan? A About 30 years.

Q About 30 years. Did there come a time, Mrs. Yelverton, when you went to live with Mrs. McClellan? A I went to live with Mrs. McClellan in December, 1941, just before Pearl Harbor.

Q At that time she was Mrs. Anne G. Morgan, was she not? A Yes.

Q She was not married to Mr. McClellan? A No.

Q And how long did you live with her from just before Pearl Harbor in 1941? A I lived there until
311 about June, I think, 1943. I know it was 1943. I guess it was June, 1943.

Q Where did you remove to then? A Back to my apartment. I had sublet it, and I went back when the people moved back.

Q Did there come a time after that when you moved back with Mrs. Morgan? A Yes, in December, 1944, I think it was, yes.

Q You had rented your apartment again? A During the war I rented it to Oliver La Forge, Lieutenant-Colonel in the Air Corps, and his wife.

Q You moved back with Mrs. Morgan as of what date in 1944? A It was in December. I couldn't tell you the exact date. I think it was the 15th.

Q 15th of December, 1944? A Yes.

Q From that time on, how long did you live with Mrs. Morgan? A Until August, about the 15th, 1947.

Q August 15th, 1947? A Yes.

Q At what address was Mrs. Morgan making her home during both periods that you lived with her?

* * * *

312 A 3216 Klinge Road.

* * * *

Q Now, at the time you were living with Mrs. Morgan, who later became Mrs. McClellan, were you living with her as a house guest, or a paying guest? A As a paying guest.

Q What room rent were you paying Mrs. Morgan when you first came there? A When I first went up there fifty dollars, then when I went back, sixty dollars.

Q When you went back in 1944? A Sixty, yes.

Q Who fixed the rent of fifty dollars? A Mrs. Morgan, because it was her home. I wouldn't have fixed the rent.

Q When you came back to live there in 1944, who brought about the increase from fifty to sixty dollars? A I did.

Q You did? A As far as I know.

* * * *

313 Q Did you pay that directly to Mrs. Morgan? A Yes.

Q Did she give you a receipt for it? A She was a very good friend of mine. I would just pay the money.

Q Did you pay her by cash, or by check? A By cash.

Q Will you tell us a little more, please, about the circumstances under which you would pay her the rent every two weeks? A I would just hand it to her. That is all I know. It would be due, and I would give her the money.

Q Do you recall in what part of the house you would hand it to her? A Wherever she was.

Q Did you ever go up and lay it on a night table while she was asleep? A I don't remember.

Q If that had happened, you would remember? A
 I suppose so, because as you go along in life you
 314 don't remember everything like that. I don't re-
 member.

Q During the two periods you were a roomer in the
 home of Mrs. McClellan, were there any other roomers
 at the same address?

* * * *

A Yes. There was Mr. Louis Griffin and Mr. Frank
 Leland later.

* * * *

Q When did you first meet Mr. McClellan? A I met
 Mr. McClellan in 1944.

Q And where? A Up at Mrs. McClellan's.

Q Where was he living at that time, if you know?

A I think on Wisconsin Avenue. I don't know the ad-
 dress.

315 Q Did there come a time when he became a
 roomer at the home of Mrs. Morgan? A Yes.

Q What year was that? A I don't exactly know
 whether it was—let me see—I think it was about 1945, or
 the end of 1944. I don't remember.

Q It was during the time you were also a roomer?
 A Oh, yes. I was also there.

Q In addition to yourself and Mr. McClellan, did any-
 body else live there as a roomer? A Nobody but the
 maid sometimes on the top floor.

Q Now, Mrs. Yelverton, will you tell us, please, wheth-
 er or not you participated in any recreations or pastimes
 with Mrs. Morgan during the evenings that you were
 there? A With Mrs. McClellan? Yes.

Q Yes. A Yes. We used to play poker, and then
 sometimes we would just chat, you know.

Q Who else besides you and Mrs. McClellan would
 engage in that? A Mr. McClellan.

Q Anyone else? A Sometimes Mr. Dixon.

316 Q Mr. Dixon? A Yes.

Q On how many occasions would you say you played poker with Mrs. McClellan? A Well, I couldn't say how many times. It would be two, three times a week. We would just play a few hours, just for fun, and that was all—that is about all I can think of.

* * * *

Q What kind of a poker player was Mrs. McClellan? A Excellent.

Q She knew the value of various poker hands? A Yes.

317 Q Played a good game? A Very good.

Q What was her average of winning in these games? A Well, just about like anyone that sort of wins and loses—win and lose, like anybody.

Q Fifty-fifty? A Little better than that. She was a good poker player.

Q Mrs. Yelverton, did there come a time in the spring of 1945 when Mrs. Morgan requested you to witness a will? A Yes.

* * * *

Q But you are positive it was in the spring of 1945? A Yes. It was a will.

* * * *

Q Do you recall where it was executed by Mrs. Morgan? A Well, I think I signed it in her home, along with Mrs. Rose Wood and Mr. Dixon.

* * * *

318 Q To the best of your recollection there were three attesting witnesses? A Yes.

Q Yourself, Mrs. Rose Wood and Mr. Dixon? A Yes.

* * * *

Q Did you sign after Mrs. Morgan, or before she signed? A I wouldn't know. I don't know.

Q But there was no one present, to your recollection, except you four—Mrs. Morgan and the three attesting witnesses? A I don't know whether there was anybody else there or not. I can't remember if they were.

Q What was the mental attitude of Mrs. Morgan at that time? Did she understand what she was doing? A Yes.

Q She knew she was executing a will? A Yes.

Q And that was in the spring of 1945? A As far as I can remember now. Now I can't tell you the exact date, because I just don't remember. But it was some time along there.

Q Did she tell you "This is my last will and
319 testament."? A She said "It is my will, and I want you to sign it," and I signed it.

Q Was she, in your opinion, of sound and disposing mind and memory at that time? A Yes.

* * * *

320 Q Now, Mrs. Yelverton, were you living at the home of Mrs. Morgan in October of 1946, when she married Mr. McClellan? A Yes.

Q Were you a guest at that wedding? A Yes. I stood up with Mrs. McClellan.

Q You were the bridesmaid, so-to-speak, at the wedding? A Well, yes.

Q Being one of her best friends? A Yes.

Q And were you employed at the R.F.C. at that time? A Yes.

Q Did you work that day? A No.

321 Q You took the day off? A Yes.

Q And I take it then you were at the Morgan residence that morning before going to the parsonage, or the church? A Yes.

Q Did you see the daughter of Mrs. Morgan— A Yes.

Q —Mrs. Virginia Newby, that day? A Yes.

Q When and where did you first see her on October 19, 1946? A Well, I guess at the house. That is all I can remember. In her mother's house, or maybe at the church. I don't remember.

* * * *

Q What was the approximate hour on the morning of the marriage that you first saw Mrs. Morgan? A Well, I don't know.

Q Did you take your breakfast at her home that morning? A Oh, yes. It must have been at breakfast. I don't know.

Q As far as you recall, you did see her at 322 breakfast that morning? A Yes.

Q Did you have occasion to be with her more or less preparatory to the wedding, from the morning on, until you went to the church? A Well, some, yes.

Q Do you recall how you went to the church? A In a car—in her car.

Q Do you remember who drove you? A I guess Mr. McClellan. I don't remember.

Q Do you recall at this time who else accompanied you, aside from Mrs. Morgan and Mr. McClellan and yourself, in Mrs. McClellan's car? A Well, I don't know whether Mr. Dixon went in the car or met us at the church. I can't remember.

Q But you did go with Mr. McClellan and Mrs. Morgan to the church? A Well, as far as I remember. I don't know whether Virginia took me, or they took me. I don't know.

Q You did go to the church? A Yes.

Q What church was that? A It was the church at 35th and Lowell. I think it is a Congregational Church. I am not sure.

* * * *

323 Q What was Mrs. McClellan's attitude just immediately prior to the wedding, at the time of the wedding, and immediately after the wedding?

MR. McCANN: May the Court please, I object to that as calling for a conclusion.

THE COURT: I do not know what attitude means in that particular context. Are you talking now about her condition?

MR. DAVIS: Well, I will reframe the question.

BY MR. DAVIS:

Q What was her physical appearance, we will say?

A It was good.

Q Had she, to your knowledge, been drinking that morning? A No, not to my knowledge.

Q Was she under the influence of intoxicants at the time of the marriage ceremony? A No, not that I know of.

Q Did she have to be held up and supported during the ceremony? A Well, no more than anybody
324 that is nervous getting married. I think anybody would like somebody to hold them up.

Q Was she able to stand up under her own power? A As far as I know, she was.

Q She didn't have to be physically held up during the ceremony? A I don't think so.

Q Do you recall who else was present at this wedding? A Her daughter, Mrs. Newby, and her grand-daughter, Anne.

Q You mean Mrs. Morgan's grand-daughter? A Yes.

Q That would be the older of Mrs. Newby's two children? A Yes.

* * * *

325 Q What did the wedding party do after the wedding? A They went home for a little reception.

Q And that reception was— A At Mrs. McClellan's.

Q Residence on Klinge Road? A Yes.

Q Did Mrs. Newby return to the home? A Yes. Mrs. Newby and Anne came back with us.

* * * *

Q Now, Mrs. Yelverton, within the past six months, we will say from the time of the death of Mrs. McClellan in 1950, in November of 1950, have you had occasion to talk to Mrs. Virginia Newby, the daughter? A Oh, yes. I used to see her up there at her mother's. She was a devoted daughter.

Q Did she ask you whether or not you would become a witness in this proceeding? A She has talked to me about all of this, and I have been ill, and I asked her not to subpoena me, and I think that is why she didn't.

Q But she did talk to you about being a witness in this proceeding? A Well, she talked to me months ago, not any time recently.

Q By months ago, you mean since the first of January, 1951? A Yes.

* * * *

Cross Examination

BY MR. McCANN:

Q Did I understand you, Mrs. Yelverton, to say that Mrs. Newby was a devoted daughter? A A very devoted daughter.

Q Did she to your knowledge come to see her mother nearly every day? A Yes, as far as I know. Now, of course it might be, you know, Anne would say "Virginia has been in to see her mother today." And when I was off she was there to see her mother, sometimes when I was sick or had time off, she was always there.

Q And that was Mrs. Newby's habit throughout the years you knew her? A Yes, she has been a devoted daughter.

Q I believe you stated you didn't know what time Mr. McClellan moved in to the house? A I don't know the exact date, no.

Q And you didn't know what was in the will, did you? A In what will?

Q You never saw what was in the will you were

asked to sign? A Well, yes, I knew some of it.

Q You knew some of what was in there? A Yes.

Q Would you mind telling us what was in there?

MR. DAVIS: I object.

* * *

329 MR. McCANN: That there was anyone who knew what was in this instrument that he has developed this information about. I didn't know when that instrument was executed that we have heard rumors about, whether it was before, or after.

But I had in mind here only asking if she knew the contents, to show the mother's disposition, the state of her mind at that time, as to her property.

Now we have the factual situation of a certain will made in 1946, and I think her mother's attitude toward her heirs-at-law at that time is a very important factor, and I would like to show what her attitude toward her family was at that time, from the contents.

THE COURT: That is before she married this man?

MR. McCANN: Yes. I don't know when this will was executed.

MR. DAVIS: In the spring of 1945.

THE COURT: And, so far as the evidence goes, they were married in 1946.

MR. DAVIS: The fall of 1946—a year and a
330 half later.

MR. McCANN: It would show the disposition of the mother at that time with respect to her children, don't you see? That is what I want to develop.

THE COURT: Well, I do not want to be arbitrary about it. If it has some proper bearing on it, I want to let it in, but I don't want to let it in over objection if it hasn't.

MR. McCANN: We will not risk it, then.

THE COURT: I am not too certain in my mind.

MR. McCANN: We will not risk it.

THE COURT: That settles it.

* * * *

331

Rev. Alfred W. Hurst

* * * *

Direct Examination

BY MR. DAVIS:

Q Reverend Hurst, will you state your full name to His Honor and the members of the Jury? A Reverend Alfred W. Hurst.

Q Where do you live, sir? A At 3418 34th Street, Northwest, in Washington.

Q And you are a minister of the Gospel, are you not? A Yes, sir.

Q What denomination is your church, Reverend? A Congregational.

Q Where is your church located, and what is its full name? A The Cleveland Park Congregational Church, and it is located at 3400 Lowell Street, Northwest.

* * * *

332 Q Reverend Hurst, did you know Mrs. Anne G. Morgan, who formerly lived at 3216 Klinge Road, Northwest, in the Cleveland Park area? A Yes, sir.

Q Was she a member of your church? A No, sir.

Q How long did you know her prior to her death in November, 1950? A Well, I knew her from the time of the marriage, which was October 19th, 1946.

Q You performed the marriage ceremony between her and Mr. Alfred D. McClellan, did you not? A I did.

Q I will show you this paper, Reverend Hurst, and ask you if this is your signature, and if you can identify that paper? A Yes, sir. That is my signature.

Q That is the original certificate of marriage? A That is right.

* * * *

MR. DAVIS: I offer this in evidence, if it please the Court.

THE COURT: Let it be admitted.

(The document marked Defendant's Exhibit No. 11 was received in evidence as such.)

* * * *

334 Q Do you recall at this time, Reverend, where this ceremony was performed, whether in the church proper, or in the parsonage? A In the church proper.

Q In the church proper. Do you recall what time of day on October 19th, 1946, the wedding took place? A

I think—I have the impression it was the evening,
335 but I don't recall.

Q By evening, you mean after twelve o'clock Noon? A That is right.

Q Do you recall at this time, Reverend, who made the arrangements for the use of the church and for you to officiate at this wedding? Was it Mrs. Morgan or Mr. McClellan? A I do not recall whether both of them came to see me or not.

* * * *

336 Q Reverend, what was the physical condition of Mrs. Morgan at the time of this ceremony?

MR. McCANN: If he knows, Your Honor.

THE COURT: Yes. He can't answer if he doesn't know.

A I have no knowledge concerning her physical
337 health. I know that she was able to come to the wedding and stand up for the wedding, as anyone else would, and that is all I can say.

Q The ceremony was not performed with either or both principals seated, was it? A No, sir.

Q The usual practice is to have the two principals stand before the pastor? A That is right.

Q While you recite the marriage vows and the statutory ceremony? A That is right.

Q Was Mrs. Morgan, or Mrs. McClellan—did she make the proper responses to your questions? A She did.

Q Did Mr. McClellan, likewise? A He did.

Q Were either Mr. McClellan or Mrs. Morgan under the influence of intoxicants when you performed this ceremony?

* * *

338 THE WITNESS: Not to my knowledge, or I certainly would not have performed the ceremony.
BY MR. DAVIS:

Q Did either or both of them give any visible evidence of having indulged in alcoholic beverages prior to the ceremony? A Not that I know of.

Q How close did you stand to both principals as you were performing the marriage ceremony? A Oh, I would say within three feet.

Q Then, if there had been an odor of alcohol on either or both of them, you would have smelled it, would you not? A I suspect I would have.

Q And if there had been any evidence of either or both of them being under the influence of intoxicants, would you have performed the ceremony? A I would not.

* * *

339 Q Reverend Hurst, did you have occasion after October 19th, 1946, the date of the marriage ceremony, to see either Mr. or Mrs. McClellan? A I called in their home a few times.

Q And did they on occasion attend your church in the four years after the marriage? A Very occasionally.

* * *

340

Joe C. Newcomer

* * * *

Direct Examination

* * * *

Q What is your occupation? A I am in the Promotion Department of the Lawyers Title Insurance Company.

* * * *

Q Are you here today in response to a subpoena duces tecum served upon your company to produce your company file with reference to your company's case 21758?

A I am, sir.

341 Q Do you have the file with you, sir? A Yes, sir.

Q That refers to a sale of real estate, Mr. Newcomer, on April 8, 1948, being Lot 27 in Square 2101? A Yes, sir.

Q Do you have the full file on that, sir? A Yes, sir.

Q Do you have a copy of the sales contract which preceded the actual settlement? A Yes, sir.

Q Would you separate it from your file, please? A (Witness hands same to counsel.)

Q Is this an exact copy of the sales contract? A To the best of my knowledge, it is.

Q And this shows this contract, the original contract, to have been executed on March 22nd, 1948? A Yes, sir.

Q The purchaser being Duncan C. Lee? A Yes.

Q The seller, Anne G. McClellan? A Yes, sir.

Q And the salesman who negotiated the deal, Edward Jones? A Yes, sir.

342 Q Of the firm of C. Newton Jeffress? A Yes

Q The total consideration was \$21,500? A Yes.

Q With a deposit of \$1,000.00? A Yes.

* * * *

MR. DAVIS: I offer this in evidence, if the Court please.

MR. McCANN: No objection.

* * *

344 BY MR. DAVIS:

Q In pursuance of that contract of sale, Mr. Newcomer, was a date for settlement fixed at your company? A Yes, sir.

Q And what was that date, sir? A April 8th, 1948.

Q Who was the settlement clerk at that time? Who handled this deal? A Thomas Dade.

Q Where is Mr. Dade today? A He's in Mexico.

* * *

BY MR. DAVIS:

Q Was Mr. Dade, in addition to being a settlement clerk, a Notary Public? A Yes, sir.

Q Now, referring to the settlement sheet, Mr. Newcomer, do you have the original? A I have a carbon copy of the original.

Q A carbon copy, and that is made up, one copy to the seller, one copy to the purchaser, is that true? A Yes, sir.

Q I will ask you if you can identify this paper marked Defendant's Exhibit No. 7? A This is an original of my carbon, except for one item.

* * *

346 Q Now, after settlements sheets are made up showing the deductions for payment of trust, taxes, fire insurance, and so on, is it the policy of your title company to require the endorsement of the *seller* on the *seller's* copy of the settlement sheet? A Yes, sir.

Q I will ask you to refer to Exhibit No. 7, and tell the Court and Jury whether or not the seller's endorsement appears on that sheet? A It does.

347 Q And does the carbon of that signature appear on your office copy? A Yes, sir.

* * * *

Q Now, at the date of settlement, April 8th, 1948, was a deed executed to this property by the seller to the purchaser? A Yes, sir.

Q And was the seller's acknowledgment taken by a Notary Public at that time? A Yes, sir.

Q I believe you said you are a Notary. Are you, Mr. Newcomer? A Yes, sir.

Q Will you tell the Court and Jury the form of acknowledgment taken by a Notary Public in this
348 jurisdiction on conveyances? A Well, the Notary Public asks the party if this is her free act and word and deed, and she nods, and says yes.

Q And then, and then only, the Notary takes the acknowledgment? A Yes, sir.

Q If there is any indication that it is not the party's free act and deed, do you as a Notary take an acknowledgment? A No, sir.

Q Referring to your copy, Mr. Newcomer, of the seller's sheet, will you tell the Court and Jury the commission paid to the form of C. Newton Jeffress? A \$1075.00.

* * * *

349 *Charles Newton Jeffress*

* * * *

Direct Examination

* * * *

Q What is your occupation? A Real estate broker.

Q How long have you been a licensed real estate broker in this City? A Since February of 1944.

Q Prior to that time, were you a real estate salesman, and licensed as such? A Yes.

Q How long have you been engaged in the real estate business altogether?

* * * *

A Since October, 1944.

* * * *

350 Q Did your firm handle the sale of the premises, 3216 Klinge Road, Northwest, in Cleveland Park?

A Yes, sir.

Q On or about March or April, 1948? A Yes, sir.

Q Do you have your office file with you? A Yes, I do.

Q Do you have a copy of the original sales contract? A I think I have the original copy, sir, itself.

* * * *

351 Q Mr. Jeffress, did you personally handle this transaction? A I had best answer that this way. The purchaser, Mr. Lee and his wife, were clients or prospects, whichever you want to call them, of a salesman in my employ, Mr. Edward Jones, and he showed the property to his people.

* * * *

Q Now, referring to your office copy of the original sales contract, I notice it is dated March 22nd, 1948. A Yes, sir.

Q And has as the first signatory, the name, Duncan C. Lee, Purchaser, opposite the date, March 22nd, 1948. I assume from that that Mr. Lee signed the contract after it was prepared, as of that date? A To the best of my recollection, that is correct.

Q And after he signed it, it was then submitted to the seller. Is that correct? A That is correct.

Q And the seller was Anne G. McClellan, who signed it, according to your copy, on March 24th, 1948, two days after the purchaser? A That is correct. That is my memory, and as it is recorded there.

352 Q So that you may take that back with you, what is marked as Defendant's Exhibit 12, is an exact copy?

* * * *

A To the best of my knowledge and belief, it is.

Q And your contract contains the actual original signatures of the seller and purchaser? A Yes, sir.

Q And the only signature of the seller is Anne G. McClellan? A That is all. Yes, sir.

* * * *

353 Q And it does not have the signature of her husband, Alfred D. McClellan? A No, sir.

Q Were you present at the title company on April 8th when this deal was finally consummated? A Yes, sir. I don't recall the date, but I was present when the deal was consummated.

Q Who else was present at the date of settlement? A As I recall, the purchaser and his wife, Mr. and Mrs. Duncan Lee, and Edward Jones, my salesman; Mrs. McClellan, and Mr. McClellan, I believe.

Q Anyone else? A Myself. I don't recall anyone else.

Q Do you remember the name of the settlement clerk for the Lawyers Title Insurance Company, who handled the deal? A Mr. Dade generally handled most of my cases. I believe he handled this one.

Q Were you present when the deed was executed by Mrs. McClellan to the Lee's? A I believe I was.
354 Yes, sir. Of course that is the title company matter, and I was present there at the entire negotiations for the conveyance of the property.

Q Do you recall Mr. Dade, the settlement clerk and notary who took Mrs. McClellan's acknowledgment, administering the acknowledgment to her? A To the best of my recollection, yes. It is pretty much of a form affair, and I don't know that there was any exception in this case.

Q At that time, on April 8th, 1948, was Mrs. Anne G. McClellan capable of executing a valid deed or contract?

A In my opinion, yes, sir.

Q Now, Mr. Jeffress, do you know the daughter of Mrs. McClellan,—Mrs. Virginia Newby?

* * * *

Q You have known her for a period of some fifteen or twenty years, at least? A That is correct.

Q Between the contract date for the sale of 355 this property, which was March 22nd, 1948, and the actual date of settlement, April 8th, 1948, did you have a conversation with Mrs. Newby concerning this matter? A I may well have, yes, sir.

* * * *

Q Were any steps taken by Mrs. Newby, or was the subject brought up in conversation with you, with reference to stopping this particular sale? A No, sir. I don't recall any such action, or any such request.

Q Did you have more than one conversation with Mrs. Newby concerning this matter? A That I don't recall, and this file that I have here is just a regular folder in which we place all pertinent papers to real estate transactions. In this instance, much of this detail was handled by Mr. Jones, who represented one-half of this transaction, namely, the purchasers.

Q Mr. Jones was your employee, was he not? A That is right. That is correct.

Q The total commission on this deal was \$1075.00? A I believe that is the figure—5 per cent of the sale price.

Q Of the sale price? A That is correct.

* * * *

356 Q I ask you whether you had one conversation with Mrs. Newby about this matter, or more than one? A I don't recall whether I had more than one.

Q Could you fix the time a little more definitely that you did have the one that you are sure of? A No, I can't. There is no record of that any place.

Q Could you fix it as being before April 8th, 1948, or after April 8th, 1948? A I suppose you are referring to the settlement date.

Q Yes. A If my memory serves me correctly, it was likely before that day.

Q Before that day, and to the best of your recollection you had only that one conversation with her? A I believe so. Yes.

* * * *

Cross Examination

* * * *

Q When did you become acquainted with Anne
357 G. McClellan? A Oh, about the age of eight. Let me see—nineteen—

Q Will you state the circumstances of your acquaintanceship with her? A Well, I knew her son and daughter as children. I met her in that manner, through the son, Mr. Marshall Morgan.

Q Between the age of eight and what, would you say, were the times you knew her best as a child. Could you set some period there? A Well, I knew her during my grammar school years in Cleveland Park, which is the area adjacent to this property.

Q Were you frequently in her home? A Yes, sir. I was.

Q Were you a pal with her son, Marshall Morgan? A Yes.

Q You got to know her pretty well at that time, did you not? A Yes, sir. That is correct.

* * * *

358 Q You remember the question. Describe Mrs. McClellan during your childhood, when you were in her home frequently? A Yes, I know the question. Well, I can describe her as a very delightful, fine person. I don't know how much you want me to elaborate

359 on that, other than to say that I always considered her a very dear friend, and a very fine person in every respect.

Q Now, did you ever live in the home of Mrs. Morgan?
A Yes.

Q At what time was that? A From the period, very roughly, four odd months, in 1932, from about Christmas time of 1932, and for about roughly four months thereafter.

Q What was her condition at that time?

MR. DAVIS: I object, as certainly too remote—1932. We are getting back now twenty some years.

THE COURT: Well, I have let in some rather remote evidence from both sides. I will permit the question to be answered.

* * * *

A Well, it was just about the same as it had always been.

Q That was before her divorce? A To the best of my memory, yes.

Q Now, did you ever live in her home at another time?
A Yes.

Q When was that? A That was for a period of
360 roughly two months, from June, as I recall, or June and July of 1943.

Q And what was her condition at that time?

MR. DAVIS: I object, for the same reason, if the Court please.

THE COURT: Same ruling.

THE WITNESS: Well, of course, she had aged just that much, and was not really quite—quite the same person, for that contributing reason, I suppose, as she was some ten years before.

BY MR. McCANN:

Q What were her habits, as you observed them?

MR. DAVIS: I object.

THE COURT: Overruled.

THE WITNESS: Can you elaborate a little more on what you mean by that?

BY MR. McCANN:

Q What were her habits with respect to the use of alcohol during the two months you stayed there?

MR. DAVIS: I object to the form, if the Court please, as purely leading.

MR. McCANN: It is cross-examination.

THE COURT: It is cross-examination. I will overrule the objection.

THE WITNESS: Do I answer that, Your Honor?

361 THE COURT: Yes.

THE WITNESS: She used alcohol during that time.

BY MR. McCANN:

Q To excess?

MR. DAVIS: I object. That is a matter of opinion. He can tell how much she used, and let the jury form its own conclusion.

THE COURT: Yes, I think it should be to what extent she used it.

* * * *

Q To what extent did she use it? A Well, I don't know whether I could properly say to excess or not, but certainly she used it.

* * * *

362 Q Did you see her when she was drunk? A

Well, I don't know whether you can use that word or not. It just depends on how you want to look at it. Alcohol naturally affects people when they drink it.

Q Now, did you see her evening after evening when she was under the influence of alcohol? A I have. Yes, sir.

Q There had been a marked change in her habits between the time you knew her in 1932, and when you stayed in the house in 1943, had there not? A Yes, sir. There had been.

Q She was a different personality, was she not? A If you want to use that term, yes.

Q And she was at that time that you were there a confirmed alcoholic, was she not?

363 MR. DAVIS: I object.

THE WITNESS: I don't believe I am in position—

MR. DAVIS: Just a minute. That calls for a medical opinion, if the Court please—confirmed alcoholic—and what the method of (confirmation) is, I certainly don't know.

THE COURT: I think the witness was about to say he didn't know, either. You were about to say that when you interrupted him, weren't you?

THE WITNESS: I think as a layman, I don't know whether I can say she was a confirmed alcoholic. It is a rather fine line there, I suppose.

BY MR. McCANN:

Q She was an alcoholic? A Well, I will have to say that is sort of a matter of opinion.

Q What is your opinion? A Let's say verging upon it.

MR. DAVIS: I object.

BY MR. McCANN:

Q What is your opinion—

MR. DAVIS: I object, if the Court please. That relates back to my question objection. The witness has detailed the extent of use, as he saw it. It is up to the jury to form its own opinion. I object to the witness's opinion on that point, one way or the other.

THE COURT: I think myself that is some-
364 thing—

MR. McCANN: We will not urge it, Your Honor.

* * * *

366 Q Now, then, did you have any telephone conversation at all in connection with this contract,

after the buyer had signed it, with Mr. McClellan? A Any telephone conversation with Mr. McClellan?

Q Yes. A After the purchaser had signed it?

Q Yes, sir. A Is that before Mrs. McClellan had signed it, or after?

Q Yes, before Mrs. McClellan had signed it. A I believe I had some conversation with Mr. McClellan. I felt that he was entitled to at least courtesy in the matter, and gave him all the courtesy that I knew how.

Q Now, isn't it a fact that in your conversation with Mr. McClellan, you told him that you had left the contract,—or that they had signed the contract, and gave him the terms, and he said it sounded all right to him, but that he would let you know, he would think it over and let you know the next day or so?

MR. DAVIS: I object.

A That in effect is what this note says.

* * * *

367 Q Isn't it a fact that you tried to get Mrs. Morgan to accept back a deed of trust, as a protective measure for her?

* * * *

A I don't know whether the word "tried" is correct. I suggested it, because I felt that it might be a form of investment for her.

* * * *

368 Q Did you have in mind in making that suggestion, also, protection of the interests of Mrs. McClellan? A Yes, I did.

* * * *

369 *Herbert A. Dixon*

* * * *

Direct Examination

* * * *

Q What is your occupation? A Inspector of Materials for the District Government.

Q How long have you been affiliated with the
370 District of Columbia Government? A In the tenth year.

Q This is your tenth year? A That is right.

* * * *

Q Do you know Mr. Alfred D. McClellan, seated at the end of the trial table? A I do.

Q How long have you known him, sir? A Over twenty-five years.

Q Did you know his late wife, Mrs. Anne G. McClellan? A I did.

Q How long did you know her prior to her death? A Well, several months before their marriage, which was on, I believe in October, 1946.

Q You first met her several months prior to October, 1946? A That is right.

* * * *

371 Q After you first met Mrs. Anne Morgan, who later became Mrs. McClellan, how often would you see her, on an average, from the first time you met her on? A Well, I don't know about the average from the first time on, but after they were married I saw them on the average of almost once a week. There might be some weeks I would miss, but quite regularly, most every week.

Q Were you a guest at their wedding? A I was.

* * * *

Q Were you what might be considered the best man at the wedding? A I was.

Q Due to your friendship with Mr. McClellan?
372 A That is right.

Q Did you accompany Mrs. Morgan and Mr. McClellan to the church? A I did.

Q Where did you first meet them that day? A At Mrs. Morgan's home.

Q On Klinge Road? A On Klinge Road? No.—
Yes, Klinge Road.

Q Do you recall what time you arrived at the residence the day they were married? A Not the exact time. I arrived possibly an hour before time to leave for the church.

* * * *

Q In the hour you were at their home before going to the church, was there any drinking done by anyone in your presence, or to your knowledge? A Not in my presence, not before we left the house.

* * * *

Q Do you recall who accompanied you, besides Mr. McClellan and Mrs. Morgan? A Mrs. Yelverton.

Q Mrs. Yelverton? A That is right.

Q What was the condition of both Mrs. Morgan and Mr. McClellan at the time of the marriage ceremony, as to sobriety? A Well, they were sober.

* * * *

Q Did you have the usual post-wedding reception? A Yes. I brought along a little champagne.

Q You furnished champagne? A Yes.

Q Was there any whiskey drunk after the wedding, at the reception? A I didn't see any.

Q Except the refreshment you provided? A I
374 didn't see any.

Q After their marriage, you say you saw them once a week on an average? A Approximated, yes.

Q On those occasions, what sort of social pastimes did you engage in? A Well, we played cards mostly, and I worked a little in the garden, helped Mac with his tomatoes and flowers in the garden quite a bit.

Q Did Mrs. McClellan engage in these card games? A Very definitely.

Q What kind of games were they, bridge, euchre, five hundred, gin, or what?

* * * *

A Variated poker.

Q What you might call dealer's choice? A Yes.

Q Variated poker. What was your opinion as to Mrs. McClellan's ability as a poker player? A She was about the best I have seen.

Q She knew the value of poker hands? A She knew the value and what to do with them.

Q Now, Mr. Dixon, was there an occasion in early—
or before the marriage, that you were called upon
375 to witness a will of Mrs. Morgan's?

* * * *

A I think I recall I witnessed her signature.

376 Q And who else acted as witnesses to that paper
with you? A Mrs. Yelverton may have. I won't
be positive.

Q Do you know a Mrs. Rose Wood? A I met a Mrs. Rose Wood at McClellan's.

Q Do you recall whether or not she also witnessed the same paper you and Mrs. Yelverton did for Mrs. Morgan?

A I don't know. I don't recall.

Q But you do definitely recall witnessing a paper—
A (Interposing) Yes.

Q (Continuing)—for Mrs. Morgan which she described as her will? A Yes.

Q And at the same time Mrs. Yelverton did likewise?
A I won't be sure. I don't know whether it was Mrs. Yelverton or Mrs. Wood. Both of those ladies visited from time to time at the house, and it may be one occasion when one of them was there.

Q You are positive it was before her marriage to Mr. McClellan that you witnessed this paper? A As I recall, yes.

Q Now, what is your opinion as to the mental faculties, testamentary capacity, of Mrs. Morgan at the time you witnessed that paper? Was she capable of executing a valid deed or contract?

* * * *

378 BY THE COURT:

Q Did this take place at the home of Mrs. Morgan, that you are talking about right now? A It did, Your Honor.

Q I got that impression from what you said. Whether you explicitly stated it or not, I don't recall. Can you fix any more definitely than you have, when the occasion was? A No, Your Honor. I cannot. I spoke as definitely as I could on that matter.

* * * *

Q Do you understand that question? A Yes, I do. I think she was.

Q Referring back a moment, Mr. Dixon, to these
379 weekly poker sessions, did you ever have occasion to notice whether or not Mrs. Morgan, later Mrs. McClellan, would call anyone's attention to a mistake some other player had made in the game, or in under playing their hands? A Occasionally she did do that.

Q Did she ever make any statement to you during the time you knew her, prior to her death, as to her attitude toward Mr. McClellan, her husband?

* * * *

THE COURT: I think if the witness knows, he
380 can testify as to what the relationship was between the two, insofar as he could observe it.

THE WITNESS: Well, so far as I was able to observe, it has always been very congenial. There seemed to be a great fondness between the two people.

* * * *

381 Q Mr. Dixon, were you ever at the residence on Klinge Road when Marshall Morgan, the son of Mrs. McClellan by a former marriage, made an assault upon her husband, Mrs. McClellan? A I was.

Q Will you tell us the circumstances of that assault?
A Well, we were playing cards at the table in the front

room, and Marshall Morgan came in the room with a stick from the front door, I think it was part of a rail off—part of the wooden piece off the rail that runs down the front steps.

Q How big? A About that long, about that round (indicating), maybe an inch and a half by three or two by four.

382 Q About the size of a two by four rail? A That is right.

Q What happened? A He rushed in. He swung at his mother first. Then Mac intercepted it, and took it away from him, and chased him out of the house, and down the street.

Q He swung it at his mother? A Yes.

Q And you say Mr. McClellan chased him down the street? A That is right.

Q Who else was playing cards with you at that time? A Mrs. Yelverton and Mrs. Morgan—I mean Mrs. McClellan, and Mr. McClellan.

MR. McCANN: May it please the Court: I move it all be stricken as incompetent, irrelevant and immaterial.

THE COURT: It certainly has no connection,—has not been connected up with any coercion or lack of it with respect to the sale of the property, Mr. Davis.

* * * *

Q During the time you knew Mrs. McClellan, prior to her marriage, did she ever express to you any manifestation of her memory—

THE COURT: Wait a minute. Are we leaving this matter that I have just been asked to strike?

MR. DAVIS: Yes. It shows an attempted as-
383 sault on the testatrix.

THE COURT: I will direct the jury to disregard the testimony. It has not been made to appear that it has any connection with the sale of the property that counsel said it was introduced to affect. Go ahead.

MR. DAVIS: I submit respectfully, if the Court please, that it does show the attitude of the testatrix toward her own son, and as a reason for the bequest in the will in the amount it was to the son. The whole case bears upon the attitude, the memory and the knowledge of the objects of her bounty, of this testatrix, and here is direct evidence of attempted assault by one of her own children upon her.

THE COURT: All right.

Q * * *

after her marriage, during the entire time you knew her, did she ever express any manifestation of her memory?

A Well, she spoke of her home place in Mississippi, I think she told me it was, when she was a girl. She described that. And there was a picture over the mantle in the living room she said reminded her of her father, he was that type gentleman.

Q Did she ever discuss with you the numerous
384 trips she had made across the ocean to England?

A Yes, she mentioned quite a few times about the trips she had taken to England on the ocean liners, got quite a kick out of talking about it.

* * * *

Cross Examination

* * * *

385 Q Mr. Dixon, while you were visiting there in
the home, will you describe the procedure that took
386 place, say, at one of these poker parties? Did you
go there for dinner first? A Sometimes.

Q You went there sometimes for dinner? A That is right.

Q Did you have a drink before dinner? A Sometimes have a drink before dinner and sometimes not.

Q Did you ever have dinner in that home in your life without having a drink before dinner? A Yes, I have.

* * * *

387 Q Now, then, after dinner did they have drinks served as you played poker? A One or two during the evening.

Q Just one or two? A One or two during the evening. In other words, it was a poker party, it wasn't a (whingding).

* * * *

BY MR. McCANN:

Q Did you know that Mr. McClellan was married
388 to another woman while he was a roomer at Mrs. Morgan's house?

MR. DAVIS: I object. It is entirely immaterial and irrelevant.

THE COURT: No. I will let him answer whether he knows it or not.

* * * *

Q Did you know Mr. McClellan was married to another woman while he was a roomer at Mrs. Morgan's house? A No. I know Mr. McClellan had a former marriage, but that was years ago, when I first knew him. In fact, Mac's son and my son grew up together from five or six years old, right on up until my boy went in the Army and his boy went in the Navy.

Q You didn't know he was still married to his former wife when he was a roomer there in Mrs. Morgan's house? A I don't know. I don't know these personal things.

MR. DAVIS: Just a moment, Mr. Dixon. I object to the form of that last question.

MR. McCANN: I think the question is reasonable, Your Honor.

THE COURT: I thought it was. Obviously, he wasn't living with his wife. The question was, did he know the former marriage had been terminated at the time
389 he was a roomer there? That is what you mean?

MR. McCANN: Yes.

THE COURT: I think that is a proper question. Whether you know it or not is something for you to say.

Whether it was so or not, I don't know, but you are being asked that.

THE WITNESS: I don't know the exact time of his divorce, Your Honor. I knew he was married.

THE COURT: All right. That answers it.

* * * *

393

Cora Lee Canty

* * * *

Direct Examination

BY MR. DAVIS:

Q Will you state your full name to His Honor and the members of the Jury: A Cora Lee Canty.

* * * *

Q Keep your voice up, please, so we can all hear you. What is your occupation? A Nurse. Practical nurse.

Q You are a practical nurse? A Yes, sir.

Q How long have you been engaged in that business, or profession? A Oh, about three years.

Q Three years A Yes.

Q Did you know Mrs. Anne G. McClellan? A Yes, I did.

394 Q Did you have occasion to work for her professionally as a nurse? A Yes.

Q When did you first work for her as a nurse? A Last year, as near as I can remember from August 5th to about September second. I was there six weeks.

* * * *

Q For what illness or injury did you treat or take care of Mrs. McClellan? A A broken hip.

Q A broken hip? A Yes.

Q Were you at the home when she returned from the Sibley Memorial Hospital? A I was.

Q Who engaged you, Mrs. Canty? A Mr. McClellan.

Q Mr. McClellan? A Yes.

395 Q What were your hours of duty during the six weeks period you were there? A From nine o'clock in the morning until five or five-thirty, when he came home.

Q Was there anybody at the home during those hours of the daytime, aside from yourself and Mrs. McClellan?

A No, except when her daughter would come to visit.

* * * *

Q After you went off duty in the evening at five or five-thirty, who took over the nursing of Mrs. McClellan?

A Her husband.

Q Her husband?

* * * *

Q Will you tell us a little more in detail what you did?

A I gave her her food and gave her a bath, and her medication, and—

Q You say Mrs. McClellan at that time was recuperating from a fractured hip? A That is right.

Q I take it she was immobilized and was in bed
396 all that time? A That is right. She was in bed.

Q Did you have any conversations with Mrs. McClellan? Did you talk to her? A Yes, we talked right much.

Q What would you talk about? A Oh, we would talk about programs. She had favorite programs she liked.

Q Radio programs? A Yes.

Q Would you get these radio programs for her that she suggested? A That is right—that is right.

Q Did she understand the programs? A Sure—sure.

Q She knew what radio programs she wanted? A Yes.

Q She would ask you to turn on her favorite radio programs? A Yes.

Q What else? A We would read the paper and discuss what happened.

Q Did you read to her? A No, she could read.

Q She would read herself? A I would take
397 part of the paper, and she would take the other part
of the paper, and we would exchange.

Q During that period, what is your opinion of Mrs.
McClellan's mentality—her mind? A The best of my
knowledge she was perfectly sane.

Q Perfectly sane? A That is right.

Q Who paid you for your nursing services during that
six weeks period? A Her husband.

* * * *

Q Did you work Sunday? A No.

Q Who took care of Mrs. McClellan on Sunday? A
He did.

Q Mr. McClellan? A Yes.

Q He also did it during the nights, during those
398 six weeks? A Yes.

Q Mrs. Canty, during the six weeks period you
were there, from August through part of September, on
an average of how many times a week would the daughter,
Mrs. Newby, visit her mother? A She was there about
every day, or every other day.

* * * *

Q How long did the daughter stay there when she
came to visit her mother? A She would stay sometimes
an hour.

Q Sometimes an hour? A An hour, and if she was
going other places, sometimes she would just stop in for a
few minutes on the way.

MR. McCANN: Keep your voice up. We can't hear
you very well.

BY MR. DAVIS:

Q Did she during any of that period do any of the
nursing of her mother? A No.

Q You did all of that? A I did all of that.

* * * *

Cross Examination

* * * *

399 Q Did you also fix her drinks? A Yes.

Q How early in the morning would she call for a drink? A Oh, about ten o'clock—about ten o'clock.

Q About ten o'clock? A Yes.

Q Did she always eat breakfast? A Yes, she did.

Q What did she have for breakfast? A She had a—no solid food—she had a *preogamine* with milk and eggs.

* * * *

400 Q Was that all she would have for breakfast?

A That is right.

Q Then you would fix her a drink at ten o'clock? A About ten o'clock.

* * * *

Q Did she have any lunch? A Yes, she had the same thing.

Q The same thing for lunch? A Yes.

Q And you fixed her drinks after that? A Yes.

* * * *

403

Redirect Examination

BY MR. DAVIS:

Q During the time you were nursing Mrs. McClellan, she was under a doctor's care, was she not? A Yes.

Q Do you remember the doctor's name? A Doctor Cassidy.

* * * *

Q Did Dr. Cassidy come to the home during the day-time while you were there to see his patient, Mrs. McClellan? A Yes.

Q Did he know you were fixing her a drink of whiskey in the morning, as you said? A Yes, he knew it.

Q And that was with his full knowledge and consent?
A Yes.

Q And during the six weeks you were there, Mr. McClellan was at his office all during the day, was he not? A That is right, only Saturday.

Q Except Saturday and Sunday? A Yes.

* * * *

404

Recross Examination

BY MR. McCANN:

Q Did he tell you to see she didn't get too much to drink? A That is right.

Q Dr. Cassidy instructed you to that effect? A Yes.

* * * *

Q Did he give her any injections? A Yes, he did.

* * * *

405 Q Did he also give her any medicine for her liver? A Yes.

* * * *

Q And he warned you to see that she did not have too much alcohol? A Yes, give her small drinks.

* * * *

Further Redirect Examination

BY MR. DAVIS:

Q During that period, Mrs. McClellan was in quite a good deal of pain? A Yes.

Q You bathed her? A Yes.

Q Did you notice when you bathed her that she had a surgical nail in her hip to keep the hip in place? A Yes.

Q That kept her from getting out of bed completely? A Yes.

Q Weren't these shots also given by Dr. Cassidy to relieve pain? A No, I don't think they were for pain, because she had another pill for pain.

406

* * * *

James O. Edwards

* * * *

Direct Examination

BY MR. DAVIS:

* * * *

Will you state your full name? A James O. Edwards.

* * * *

Q What is your occupation? A I am a tariff clerk in the General Accounting Office.

* * * *

407 Q How long have you been employed by the Federal Government? A Oh, ten and a half years.

Q Do you know Mr. Alfred D. McClellan, the gentleman at the end of the trial table? A I do.

Q How long have you known him? A For the last ten years.

Q He is employed there, too, is he not? A Yes, sir.

Q James, did you also know Mrs. McClellan—Mr. McClellan's wife? A I met her shortly after they were married.

* * * *

Q Will you describe the circumstances under which you met Mrs. McClellan shortly after Mr. McClellan married her? A Well, when I first went to Mr. and Mrs. McClellan's address, I started out in the yard, making
408 a garden out there. It took me about a couple of weeks to do that. Then Mrs. McClellan said "When you are finished, I have some work for you to do on the inside." So I went on the inside the third Saturday and did what she asked me to do. She asked me did I know how to paint.

* * * *

A Yes. So I told her, yes, because I had done painting for myself before. She asked me what color in the dining

room, what color would make it look a little bright. Well, I didn't know, because I cannot make a good contrast of paint. So another fellow and myself got together and made the contrast that she wanted, of blue, and the ceiling a little lighter blue. So we made that contrast, and she said it was a wonderful job that we did, she liked it very much.

* * * *

Q The evidence in this case is that she was married October 19th, 1946. Could you fix the time after that date that you first met Mrs. McClellan?

* * * *

409 A Around the latter part of November.

Q Who asked you to do the general work you have just described in and about the house—who first asked you? A To tell the honest truth, Mrs. McClellan asked me first.

* * * *

Q When did you first start this work in and around the house? A Inside the house?

Q Yes. A It was after Thanksgiving.

Q Of 1946? A Yes, after Thanksgiving of that year.

* * * *

410 Q Do you still do work around the residence for Mr. McClellan now? A Yes.

Q What was Mrs. McClellan's attitude and her habits with reference to the decorating of her home? A Well, she always liked things nice, and I did the painting in the house, with some help, and the other party, he did the hanging of draperies, and so forth, because I didn't know anything about hanging draperies. And I do recall one time, or several times, that she told me to go up in the attic on the third floor, and where to find certain curtains for some parts of the house. I went up there and got the curtains, and one of the curtains had a little hole. She asked me to go up on the bureau, to a certain little con-

tainer, and get the needle and thread and thimble, so she could fix the curtain.

Q She directed you to go to the bureau, to a certain container? A Yes.

411 Q Did you find what she sent you for, there? A Yes.

Q Did you ever find she was afflicted with a faulty memory? A I can say, no, sir.

Q She would send you up in the attic to get certain draperies and curtains? A That is right, and she would also tell me where they were, what suitcase, or what bureau drawer to look in, what trunk to look in to get the curtains or the blankets, or spreads, or whatever she stored away for the summer.

Q Would those articles be in the places she told you they were? A They were.

* * * *

413 Q Was all of the furniture from 3216 moved into 3218? A Everything, even the—it was either an ice box or Frigidaire that was left, and Mrs. McClellan wanted to sell it, and I got someone to buy it. They bought it from her, and we moved that. We moved that Frigidaire, and the person who bought it asked Mrs. McClellan for the trays that were inserted in the little cabinet part.

* * * *

414 Q Did she handle that sale herself? A She did.

* * * *

Q Outside of your securing a purchaser interested in buying the Frigidaire, Mrs. McClellan fixed the sale price, did she? A She did.

Q She collected the money for it? A She did.

* * * *

415 Q Aside from what you said, what else can you tell us about Mrs. McClellan's memory? A Memory?

Q Yes. A Well, I know lots of times I would make up the bed for her, and a lot of sheets were torn, and I came downstairs and told her about them, and she made an effort to sew them. And I think she had a very nice memory.

Q What would you say would be her memory, for instance, for telephone numbers, without looking them up in the book? A Well, I have never seen her look in a telephone directory, but I have seen her make several calls, and I have also seen her answer several calls.

Q Have you ever seen her go to the telephone and dial a number without reference to a telephone directory? A Oh, yes, yes.

Q Would she get the party she was dialing? A That is right.

416 Q James, what was the attitude of Mrs. McClellan toward her husband, the gentleman you describe as Mac—Mr. McClellan? A Well, she seemed to have a very nice attitude between themselves, and she told Mr. Mac several times, "Why don't you fix yourself up—I want you to fix yourself up. Get yourself a pair of shoes. Look nice."

* * * *

BY MR. DAVIS:

Q In other words, she was interested in the maintenance of a good appearance by Mr. McClellan? A That is right. Yes, sir.

* * * *

Cross Examination

BY MR. McCANN:

* * * *

Q And are you under, or associated with, or what is your status with respect to Mr. McClellan? A Well, Mr. Mac is in a separate section from me, but we are in the same division.

* * * *

417 Q You met him when you went to work in that agency? A In the General Accounting.

Q About ten years ago? A Yes, sir.

Q Will you tell me what work you do in the A.G.O.? What is your job?

* * * *

A I am a tariff file clerk. I file all the tariffs for the railroads, steamship companies, motor carriers, that haul commodities for the United States Government.

* * * *

418 Q You went there on Saturdays only. Is that correct? A To do the heavy work was on Saturday, I have been there during the week.

Q You say you worked there during the week days? A No, I say I have been there.

* * * *

Q When you met Mrs. McClellan, when you first went there to do any work? A It was a little after Thanksgiving, a little after they got married.

Q The first time you went there was after Thanksgiving? A Yes.

419 Q Of 1946? A It was on a Saturday. Yes, sir.

Q It was on Saturday? A Yes, sir.

Q You went there to do the work in the garden that day? A Not that Saturday. We didn't do any work in the garden that day. That Saturday we went there and I think we painted that day.

Q You think you painted that day? A That particular day. Couldn't work in the garden that day because it was too cold.

Q Didn't you state that the first few weeks that you went there, you did work on the outside of the house? A Yes.

Q And didn't you in your direct testimony say you went there first to work in the garden? A Work in the garden. That is, cutting down trees, that were overlapping. I couldn't do all that in one day, because I am not used to that kind of work—took me probably a couple of Saturdays.

* * *

422 Q They were very hospitable people, were they not? A Yes.

Q And Mr. McClellan would give you drinks when you came to work on Saturdays, would he not? A No, sir.

Q He never gave you any liquor? A No, sir.

Q And you never had any liquor while you were there on Saturdays? A I got it myself.

* * *

423 Q You mean you never had any liquor while you were working there on Saturdays in his home, that was his liquor? A Yes; onliest time was during Christmas time.

Q Did Mrs. McClellan ever offer you any drinks? A Never.

Q Did she take any drinks while you were there? A I can't say I ever seen her take a drink.

Q Did Mr. Mac ever loan you any money? A Yes.

* * *

424 Q Were you suspended from your job last year? A Yes.

* * *

Q When you were there with Mr. and Mrs. McClellan, did you or did you not observe Mrs. McClellan drinking any whiskey? A I couldn't tell what she had in the glass. I never observed that.

Q Did she have a glass frequently? A I have seen her drink a lot, Coco Malt or Ovaltine, whatever it may be.

Q Ovaltine? A Yes, sir.

Q How frequently did you see her with a glass that did not have Ovaltine in it? A I can't say what
425 was in the glass. For all I can say, it might have been water—carbonated water.

Q It may have been carbonated water? Did she frequently have that before her? A I don't know. I don't observe that kind of things. All I do is what I am supposed to do—my work.

* * * *

James Lewis

* * * *

Direct Examination

BY MR. DAVIS:

Q Will you state your full name, please? A My name is James Lewis.

* * * *

426 Q Where do you work? A General Accounting Office.

Q How long have you been with the General Accounting Office? A Since 1931.

* * * *

Q How long have you been with the Federal Government altogether? A Twenty-two years.

* * * *

Q Do you know Mr. Alfred D. McClellan, the gentleman at the end of the counsel table? A Yes, I do.

Q How long have you known him, sir? A Since October, 1946.

Q Did you also know his wife, Mrs. Anne G. McClellan? A I did.

Q When did you first meet her? A In October, 1946.

* * * *

427 Q Under what circumstances did you meet Mrs. McClellan? A Well, they wanted me to do some work up there, and he asked me if I would come up to do it. I told him I would. Just odds and ends, jobs around the house.

Q What kind of work did they ask you to do? A Well, hang curtains, paint, work out in the yard, arrange the furniture the way they wanted it, or Mrs. McClellan wanted it.

* * * *

Q You did this work on Saturday? A That is right.

* * * *

Q When you first reported to do the work, who gave you directions as to what to do? A Mrs. McClellan would tell me what to do.

Q Mrs. McClellan? A Mrs. McClellan would
428 tell me what to do.

Q Would you describe in more detail what instructions she gave you? A She would tell me how to hang the curtains, how she wanted the drapes hung, and how to place her furniture. And she also told me what furniture to move from 3218, she had some furniture over there, and we moved that in the basement, and some of it we put in the house.

* * * *

Q Did you ever have any difficulty understanding the instructions Mrs. McClellan gave you? A Not at all.

Q What can you say as to her memory for different occurrences, different events? She did tell you different things she wanted done? A I would say she was of a very sound mind. She was very intelligent, had a lovely personality.

Q On how many week-ends altogether did you work in and around those two homes? A I don't recall.
429 Off and on. I would go up there every Saturday, around 1947 and 1948. I would be up there every Saturday.

Q You worked there over a period of two or three years? A Yes, sir. That is right.

* * * *

Q James, from the period of two or more years you worked for Mrs. McClellan, in and around her home, and with her, what is your opinion as to Mrs. McClellan's ability or capacity to execute a valid deed, contract, or will?

* * * *

430 A I think she was of very sound mind and everything. She had the ability to tell me what she wanted done, and I know she went into the house and told me what furniture she wanted moved, and how she wanted it moved, and where she wanted it placed. And she also told me about the furniture, whose furniture it was. And then she had some clothes up in the attic and some trunks. She told me who they belonged to. She told me how to place the trunks in the attic. And I would say she was of very sound mind at all times.

* * * *

431 Q During that period you worked there, James, did Mrs. McClellan ever demonstrate to you any lapse of memory? A No, she didn't.

Q Did she ever demonstrate during that period any incompetency to manage the affairs of her own home? A Yes, she always would manage—

Q Do you understand my question? A What is your question?

Q Did she ever demonstrate any incapacity to manage her own home, her own affairs? A Oh, no.

* * * *

432 *Cross Examination*

* * * *

Q Mr. Lewis, you said that you met Mrs. McClellan in October, 1946? A That is right.

Q State the circumstances of your meeting her? A Well, she appeared to be a person of—

Q I don't want her appearance.

THE COURT: Not what she appeared to be, but what were the circumstances under which you first met her. That is the question.

THE WITNESS: She was of a lovely personality—

BY MR. McCANN:

Q No. I want to know when you met her, and how you met her. A Well, I met her in October, 1946, and when I met her she was of a sound mind.

THE COURT: That isn't the question.

* * * *

433 Q Were you employed in the same department with Mr. McClellan? A I was in the Transport, that is right.

* * * *

434 Q How many Saturdays from October, 1946 until November, 1950, did you work at that house? A I don't recall. I worked there off and on.

Q How many Saturdays? A I can't count them.

Q Were they half a dozen? A Oh, more than that—sure.

Q Was it more than a dozen? A More than that—practically every Saturday for a couple of years.

Q You mean to say you were there as many as 104 times? A I don't know. I can't count. I don't know any definite figure. But I went there off and on.

* * * *

436 Q Did you go up there with Edwards approximately 104 times? A I say I don't know. I don't
437 recall the number of times.

Q Will you try to tell me how many times you went there? A I don't know.

* * * *

438 BY MR. McCANN:

Q How often did you plant flowers out there?

A As often as she wanted them.

Q How often was that? A I don't know.

Q Was it maybe once a year? A I don't know. Just as often as she wanted them.

* * * *

439 Q What work did you do in the house? A Painted, and fixed doors. We painted the dining room, the attic, the two sun porches, the bedrooms and other odd and end jobs.

Q You did that during the four years they were there?

A As often as she wanted it.

Q Did you do it more than once? A Yes—well, as often as she wanted it—as often as she wanted it.

* * * *

440 Q Is there any other part of that house you ever painted twice? A I don't recall. I don't recall. I know we did a lot of painting in there.

* * * *

Q Did you paint those three bedrooms more than once?

A I don't recall how many times we painted them.

* * * *

Q Did you do that, the painting of the floors, more than once? A Off and on, when she wanted it, we would paint.

Q Do you recall ever doing the floors more than once, painting the floors? A Off and on, she would have us do something on them. I don't recall how many times we did it.

* * * *

441

Redirect Examination

* * * *

Q Just one question I overlooked. Do you remember in 1948 when Mrs. McClellan sold the house at 3216 Klinge Road? A I do remember that.

Q Did you go up to that house with a truck? A I did.

Q What did you do with the truck? A We hauled some furniture to Mrs. McClellan's daughter's house in Maryland.

Q And how much of a truckload was that? A It was a good sized truckload. It was a full truck—one ton truck.

Q You took a whole lot of furniture out to Mrs. McClellan's daughter's house in Chevy Chase? A That is right.

* * * *

442

Joseph D. Malloy

* * * *

Direct Examination

BY MR. DAVIS:

Q Mr. Malloy, will you state your full name to the Court and Jury, please? A Joseph D. Malloy.

* * * *

Q What is your occupation? A Lawyer.

Q When were you admitted to the Bar, Mr. Malloy? A In the District in 1933.

Q Have you been engaged in active private practice since that time? A I have.

* * * *

443 Q Directing your attention to the month of November, 1946, were you then in the Columbian Building? A Yes, I was.

Q That is 416 5th Street, Northwest? A Yes, sir.

Q On what floor of the Columbian Building was your office located? A The first floor.

Q How long prior to November 1st, 1946, had you known Alfred D. McClellan? A Since the preceding fall, in 1945.

Q What were the circumstances under which you first met Mr. McClellan? A There was a divorce case
444 of Mr. McClellan's pending in the District Court.

Q For the District of Columbia? A That is right, and his attorney was injured—Mr. Wilson.

* * * *

A Yes. So I took over that case for Mr. Wilson, and I tried that case.

Q For Mr. McClellan? A That is right.

Q Was Mr. McClellan the plaintiff or defendant in that divorce action? A He was the plaintiff.

Q And as the result of taking over Mr. McClellan's case, was a divorce decree ultimately granted? A It was.

Q In what year was Mr. McClellan's divorce final? A It was in, as I recall it was 1946, in, I believe it was April.

Q Did there come a time when you met Mrs. Anne G. McClellan, Mr. McClellan's second wife? A Yes.

Q Will you tell us the circumstances under which you first met her? A I received a phone call on No-
445 vember 1st, 1946 from Mr. McClellan, and he asked if he could make an appointment to come down and make a will for himself, and his wife wanted to make a will, also.

Q Did you make an appointment as the result of that phone call? A Yes, they came down the same day.

Q The same day as the phone call? A Yes. That is the first time I met her.

* * * *

Q Do you recall what time you made that appointment for on that day? A I believe it was one o'clock.

Q One o'clock in the afternoon? A Yes, I believe it was that time.

Q Did both Mr. and Mrs. McClellan come in pursuance to that appointment? A They did.

Q Was that the first time you had met Mrs. McClellan?

A That is.

446 Q Will you detail to the Court and Jury what conversation you had with Mr. and Mrs. McClellan on that occasion? A Well, the conversation kinda centered on the proposed will of each of them, and so each of them told me individually what they wanted to go into their wills. And as the result, I made notations, and as the result I drew up the wills while they were there in the office.

Q You said you made notations. You mean you made longhand notations or memorandums? A Yes, sir.

Q Of what they instructed you to do? A Yes, sir.

Q Do you still have your original memorandums? A Yes, I have those.

* * * *

Q Are these the notes of the respective instructions given you by Mrs. McClellan and Mr. McClellan? A That is right, yes.

Q They were made by you on November 1st, 1946? A Yes, they were made. They gave me this information and then I typed the wills.

* * * *

447 Q Was there anyone else present in your office at the time you were having this preliminary conference with Mr. and Mrs. McClellan, aside from those two and yourself? A No, not that I can recall, there wasn't.

Q After you had physically typed the respective wills of both parties, what did you do? A After they were completed, why, my best recollection is that I read the wills, the two wills, to them.

Q You read the typewritten wills as completed, is that what you mean? A Yes, the typewritten wills as completed.

Q What response, if any, was made by Mrs. McClellan and Mr. McClellan? A My best recollection is that they were satisfied with what was typed and that is what they wanted to execute.

Q Mr. Malloy, I hand you a paper identified as Defendant's Exhibit No. 1, and ask you to examine that?

* * * *

448 Q I will hand you paper identified as Defendant's Exhibit No. 2, and ask you to examine that?

* * * *

Q Are those the two wills that you have been talking about, that you personally typed? A That is right.

Q Were the signatures on these papers affixed to the respective papers in your presence? A That is right.

Q And were all of the parties signatories to both of these papers in the presence of each other at the time the signatures were so affixed? A They were.

MR. DAVIS: I offer both of these papers in evidence, if the Court please, as original memorandums.

THE COURT: Defendant's Exhibits 13 and 14. Any objection?

MR. McCANN: No objection, Your Honor.

THE COURT: Let them be admitted.

* * * *

449 "Will"

"Alfred D. McClellan

3218 Kingle Road N.W. Wash 8 D.C.

Woodley 1411 after 6 PM

"I give and bequeath unto my son William A. McClellan of Wash D.C. the sum of \$500.

"I give divide and bequeath unto Virginia M. Newby, my stepdaughter, premises 3218 Kingle Road NW Wash DC, in the event title to said premises are in my name, at the time of my death."

And then the following appears, but which is scratched out with lead pencil: "acquired by inheritance from my wife Anne G. Morgan McClellan."

"Rest & remainder etc. to my wife Anne G. McClellan.

"Executrix Anne G. McClellan with full power to sell real estate etc. & not required to furnish bond."

* * * *

450 Q I notice, Mr. Malloy, that insofar as the specific cash bequest to a son of each of these parties by a prior marriage is concerned, that the amount of that bequest is the same,—\$500.00 in each case. Did you
451 have any conversation with Mr. and Mrs. McClellan as to the reason for that insertion? A No, I didn't.

Q Nothing was said in your presence about that? A No.

* * * *

452 Q Can you tell us approximately how long this conference in your office lasted from one o'clock until the actual execution of these two wills? A I believe it was one o'clock, but I don't believe it lasted over an hour, at the most.

Q So that you were in the physical presence of Mrs. Morgan for at least an hour on that day? A Yes, sir.

Q During that time did you have opportunity to observe Mrs. McClellan's demeanor, conduct and conversation, and other physical aspects of her presence? A Yes.

Q Was she in your opinion a person capable of executing a valid deed, contract or will at that time? A Yes, she was.

Q Was either she or Mr. McClellan under the influence of intoxicants at that time? A No, neither one of them.

Q Did either one of them give the slightest evidence of having indulged in intoxicants that day? A Well, if they did, I didn't notice it.

* * * *

453 Q Now, when it came time to go through the actual formalities of the execution of the wills, whom did you request to act as attesting witnesses? A The lawyer that had an adjoining office was Mr. Horowitz. I went in and asked him, and Mr. Baker, who had the second office up the hall, and I asked them. They were the closest persons I could get.

Q And both of their offices were on the first floor? A Yes.

Q The same floor as your office? A Yes.

* * * *

454 Q But did Mrs. McClellan then say to either of these gentlemen what this paper was that she was about to execute? A Before she executed it, I asked Mrs. McClellan if that was her last will and testament, and she answered in the affirmative. And I asked if she desired these two men to be witnesses to her will, and she answered in the affirmative.

Q And who actually signed the paper first? A Mrs. McClellan signed, and then the two witnesses signed.

Q Then were the same formalities undergone with respect to Mr. McClellan's will? A Yes, and the same witnesses.

* * * *

Cross Examination

BY MR. McCANN:

* * * *

456 Q Well, now, I am reading from Defendant's
457 Exhibit 14, and I shall pass you a tablet, and ask you to copy the second paragraph of that exhibit, on this tablet. (Handing tablet to witness.) A The second paragraph, paragraph 2?

Q Paragraph 2. A (Witness writes on sheet of paper, as requested.)

MR. McCANN: (showing to counsel) This statement is the paragraph he has just copied. Will you please mark that? I think it is Plaintiff's 1.

* * * *

MR. McCANN: I ask, Your Honor, that it be received in evidence as Plaintiff's Exhibit No. 1.

THE COURT: Any objection?

MR. DAVIS: Yes, until I know for what purpose. I do not see the materiality of it.

* * * *

458 THE COURT: Counsel has objected to it on the ground that it is immaterial.

* * * *

MR. McCANN: And I am offering this in evidence, and will ask the Court to permit us to have these three pages, for an examination, with the Court's permission, by an expert.

MR. DAVIS: Are you contending that Exhibit 14 is a forgery, and is not Mr. Malloy's handwriting?

MR. McCANN: I have not contended anything, Your Honor.

MR. DAVIS: If that is your purpose, I have no objection to its admission.

THE COURT: Well, as I understand counsel's statement, this specimen he has just asked this witness to write, which he now offers in evidence, is offered for the purpose of examination and comparison with Exhibit 14.

MR. DAVIS: I have no objection if that is the purpose.

459 THE COURT: All right. Let it be admitted.

* * * *

Q Now, Mr. Malloy, you testified a few moments ago that you were counsel in 1945 for Mr. McClellan at the time that Mr. McClellan secured a divorce from his first wife. Is that correct? A I am not certain about the

date, but I was counsel, I took over that case, and I know the trial came up about April of 1946. I don't know when I first entered into it, but I am just hazarding a guess that it was in 1945—the latter part of 1945.

Q Do you recall a deposition which was taken by Mr. Dorsey, of Alfred D. McClellan, on March 21st, 1951, in his office? A I do.

Q Do you recall that you were present when the deposition was taken? A I was.

Q And that Mr. Earl H. Davis was present when that deposition was taken? A That is right.

Q Do you recall that in that deposition, Mr. Dorsey asked the following questions, and Mr. McClellan
460 gave the following answers—

* * * *

(Thereupon, the witness left the witness stand and Counsel and the Reporter approached the Bench, and, out of the hearing of the jury, the following colloquy ensued:)

* * * *

MR. McCANN: May it please the Court: I want to show that this witness was present at the time the deposition was taken; that his own testimony is that he was the lawyer for the caveatee at the time the caveatee got the divorce, and that he listened to the caveatee give perjured testimony with respect to that divorce, and he made no effort to correct the facts in the record, nor to indicate that there was an error made by this man at that time.

* * * *

466 THE COURT: If the witness is mistaken and has forgotten, we are talking about two different things. Let us cross one bridge at a time, and I don't believe this is the time to bring that deposition in.

(Thereupon, the witness resumed the witness stand, Counsel and the Reporter resumed their places in the Courtroom, and the following proceedings were had in the hearing of the jury:)

* * * *

Q How many times prior to November 1, 1946 did Mr. McClellan consult with you about this will, Mr. Malloy?

A I have no recollection of him consulting with me at all prior to that time.

Q How many times did Mr. McClellan consult with you about his will after the execution of the will? A I don't remember any consultations afterwards.

Q You don't recall his talking with you? A Until the death of his wife, and then he called me.

Q Do you not recall that when his wife had a broken leg and was lying at their home, that he consulted with you with respect to the will? A No, sir. I don't
467 recall that.

* * * *

Q Did he ever consult with you in regard to his rights to his wife's property while she was living? A No, sir.

Q Did he ever consult you in regard to his fear that the will would be contested? A No.

MR. DAVIS: There is no evidence of that fact in issue.

MR. McCANN: This is cross-examination.

MR. DAVIS: Any fear of a will contest.

THE COURT: I think he is going into consultations about the will. He has answered the question. The answer, he says, is no.

BY MR. McCANN:

Q What, if anything, do you know about an earlier will of Mrs. McClellan? A I don't know anything about that. The first time I heard about it was after this petition for caveat was filed, and I heard about that through Mr. Dorsey, your associate.

Q How much were you paid for drawing the
468 will? A Twenty dollars. That was for the two wills.

* * * *

469 Q Did you tell Mrs. McClellan the difference between a life estate with the remainder in fee, when she asked you to draw this will? A That question didn't come up.

Q Well, did you tell Mrs. McClellan the difference between a life estate with the remainder in fee and the fact that the will of Mrs. McClellan gave the property to him absolutely, and that Mr. McClellan could make a will at any time? Did you explain that to her?

MR. DAVIS: He just stated the question didn't come up.

MR. McCANN: This is a different question. Do you want to have it read?

* * * *

470 THE WITNESS: I wouldn't explain it in that way. Here is the way I would explain it, to the best of my recollection: Mrs. McClellan said that she wanted to leave the one house to her daughter, and she wanted to leave one house to her husband, and said it was an outright devise, and I don't recall any discussion about any life estate.

BY MR. McCANN:

Q Didn't she say there that she wanted to leave this house to Mr. McClellan for life, and the remainder over to her daughter? A No, sir.

Q She didn't tell you that? A No, sir.

Q Who kept the wills after they were executed? A I did.

* * * *

Redirect Examination

BY MR. DAVIS:

Q So that there may be no mistake about the implications in this case, I ask you again, Mr. Malloy: Referring to Exhibit No. 14, is that your handwriting?
471 A That is, yes.

Q Of course the jury has just seen your handwriting on Plaintiff's Exhibit No. 1. Both of these papers contain your own personal handwriting? A That is right.

* * * *

Q Mr. McCann asked you whether or not Mr. McClellan called you and had some discussion with you about her will after she broke her leg, or hip, and your response was that you did not recall any such conversation. A That is right.

Q If any such thing had occurred, you would have recalled it, would you not, Mr. Malloy? A I believe I would, yes.

Q Now, there has been some talk about this prior will. You were present on March 21st, 1951 when the
472 deposition of Virginia M. Newby was taken in the lawyer's office? A That is right.

Q Was that the first time you ever heard of any other will except the will in question of November 1, 1946? A I am not certain if that was the first time or if it was in a conversation with Mr. Dorsey. It is one or the other.

Q Do you recall Mrs. Newby testifying in the deposition that she was aware of a will executed by her mother and witnessed by a Mrs. Yelverton, a Mr. Dixon and a Mrs. Wood? A Yes, I remember that.

Q And prior to the taking of that deposition, did you hear of any such witnesses to any prior will, or later will? A No, I never had heard of it.

* * * *

473 MR. DAVIS: We will only take testimony this afternoon for an hour?

THE COURT: That is all we can do, but I think we ought to do that. I take it there is no objection to Mr. McCann having access to these three exhibits he wants to make a comparison of?

MR. DAVIS: No, indeed.

THE COURT: All right. Let them be turned over to him.

* * * *

474 *Alfred D. McClellan,*

* * * *

Direct Examination

BY MR. DAVIS:

Q Will you state your full name, please? A Alfred D. McClellan.

Q How old are you, Mr. McClellan? A Sixty-three.

Q And when and where were you born? A Born in Mount Vernon, New York, July 18th, 1887.

* * * *

475 Q What branch of the Federal Government are you presently in? A I am with the General Accounting Office, Transportation Division.

* * * *

How long have you been with the General Accounting Office? A I have been with them since 1928.

* * * *

Q In that period of 34 years, have you ever missed a day of employment? A Never lost a day's pay.

Q Have you ever been late for employment? A Never been late.

* * * *

476 Q Did your first marriage terminate by divorce, or by death? A Divorce.

Q Who was the plaintiff in that action? A I was.

Q What was the date of your final decree? A 1945, I think it was.

Q And that became absolute six months thereafter? A Six months after.

Q What was the ground of that final divorce? A Separation for five years.

Q Voluntary five year separation? A Voluntary five year separation.

Q Was that divorce secured in the District of Columbia? A It was.

Q And had you and your wife been separated for five years prior to the granting of that divorce? A That is correct.

Q Who was your attorney in that proceeding? A Man by the name of Frederick Wilson.

Q Did Mr. Wilson file a complaint for you? A He did.

Q Did anything happen to Mr. Wilson to prevent his continuation with the case to a conclusion? A Yes, it did. He had an injury. He fell off of a horse—horseback riding.

Q Who handled the case finally for you? A Mr. Malloy.

Q Was that your first professional contact with Mr. Malloy? A It was. Yes, sir.

Q When and where did you first meet Anne G. Morgan, your second wife? A I met her some time
478 in the spring of 1945 in a restaurant on the corner of Macomb Street and Wisconsin Avenue. I was acquainted with her son. Her son introduced me to her.

Q Marshall Morgan, Jr? A That is right.

Q Her son introduced you to her? A She said that was the first thing and the only thing he ever done for her in her lifetime.

Q Did there come a time after you met her, that you became a roomer at her premises, 3216 or 18 Klinge Road, Northwest? A That is right.

Q When did you first move into that house as a roomer? A It was in the fall of 1945.

* * *

479 Q Fall of 1945. After your divorce became final from the first Mrs. McClellan, did you marry Mrs. Anne Morgan? A I did.

Q Where were you married? A In the Cleveland Park Congregational Church, at 34th and Lowell Streets, Northwest.

Q Who attended that marriage ceremony as guests of you both? A Mr. Dixon and Mrs. Yelverton and Mrs. Newby and her daughter, Anne.

Q Was that the older daughter of Mrs. Newby? A That is right.

Q At that time you were living, I believe you said, at the house as a roomer? A I was. Yes, sir.

* * * *

480 Q Getting back to the wedding for the time being, Mr. McClellan, what time did you, Mr. Dixon, Mrs. Yelverton and Mrs. Morgan leave the house on Klinge Road to go to the Cleveland Park Congregational Church?

A I think it was a little after Noon, after twelve o'clock.

Q Up to that time, had you been at the house all morning? A I was there.

Q Had Mrs. McClellan indulged in any intoxicating beverages that morning? A Absolutely not.

* * * *

481 Q Had you had anything intoxicating to drink before the wedding? A Absolutely not.

Q What was the condition of yourself and Mrs. McClellan at the time of this ceremony? A Absolutely as sober as anyone could possibly be.

Q After the marriage, Mr. McClellan, you both made your marital home at 3216 Klinge Road? A 3218.

Q 3218 Klinge Road? A Yes, sir.

Q Prior to your actual marriage, did Marshall Morgan ever borrow money from you? A Yes, he did. He borrowed money continuously. I didn't get any receipt from him, and he never paid.

482 Q How often? A Well, he had no specific time. Every time he would get drunk or get in jail and

want some money to get him out, we would have to scrape it up and get it to him in some way.

* * *

Q Did you ever take any evidence of his indebtedness?

A I did on one occasion. He and his third wife, they wanted some money. They were behind in their rent. So I think I loaned them fifty or sixty dollars, and they both signed it. Here is the document.

Q Is that the paper you refer to, that they both
483 signed? A It is.

Q That is the signature of Marshall Morgan and his third wife, you say? A That is right.

Q That is dated September 5th, 1946? A Yes, sir.

Q That was before you married Anne G. Morgan? A That is right.

MR. DAVIS: Will you mark this, Mr. Watts, as the next numbered exhibit?

(The document above referred to was marked Defendant's Exhibit No. 15 for identification.)

(Thereupon, Mr. Davis showed the document to opposing counsel.)

MR. McCANN: No objection.

MR. DAVIS: I offer this in evidence, if it please the Court.

THE COURT: Let it be admitted.

* * *

484 Q Mr. McClellan, at the time of your marriage to Mrs. Morgan, did you make any arrangement with her with reference to your Government salary? A I did, to this extent. When I married her, she was receiving a hundred dollars a month alimony from her first husband. Of course, when I married her, that alimony stopped. So I felt sorry for her to the extent that if anything should happen to me, she would be left without any income whatsoever. So I went down and changed my Civil Service

Retirement Fund, and made her beneficiary, which would have given her over \$200.00 a month for the rest of her life.

* * * *

485 MR. DAVIS: I offer this in evidence, if the Court please, as Exhibit No. 16.

THE COURT: That will be admitted.

* * * *

486 Q Now, Mr. McClellan, at that time, can you tell us the amount of your Retirement in the event of your death? A It was somewhat over \$200—I think about \$225 a month.

* * * *

Q Mr. McClellan, as the result of your Federal employment, are you a member of the United States Treasury Department Beneficiary Association? A I am.

Q Does that Association carry a group policy with the Shenandoah Life Insurance Company of Roanoke, Virginia on the lives of its members? A They do.

Q Did you as a member of that Association have such a policy on your life? A I do.

* * * *

487 Q After your marriage to Anne G. Morgan, did you change the designation of beneficiary in that insurance policy from whoever it was at that time, to Anne G. McClellan? A I did.

Q I will show you this paper, and ask you if that is the insurance policy to which you have been referring? A Yes, sir. That is the policy I referred to.

* * * *

488 THE COURT: Have you offered it in evidence? MR. DAVIS: I offer it now formally.

THE COURT: Any objection?

MR. McCANN: No objection.

THE COURT: Let it be admitted.

* * * *

489 Q Now, Mr. McClellan, at the time of your marriage, what was your Government salary per annum? A About fifty-eight hundred dollars.

* * * *

Q Has it remained the same up to the present time? A No, I am making six thousand at the present time.

Q After your marriage to Anne G. Morgan, did you and she open a joint checking account? A We did.

Q What did you do with your salary as you received it from the Federal Government? A I mailed it in by deposit to the Liberty National Bank.

Q You deposited the entire check with the Liberty National Bank? A Liberty National Bank.

Q Was that the bank account in which you had your joint checking account with Mrs. McClellan? A Yes, sir.

Q Did you both draw on that account? A We did.

490 Q Mr. McClellan, will you briefly, without going into too much detail, describe the physical and mental condition of Anne G. Morgan at the time you married her on October 19th, 1946? A Yes. She was very well and healthy. In fact, just before we were married, she used to drive her own automobile down to my office to pick me up from work, did that sometimes most every night during the week. And we would go out and eat most times if we didn't have a maid home to do the cooking for us. We would go to the various eating houses and stop and have our evening supper, and go to a show, and then come back home.

Q And after your marriage in November of 1946, did Mrs. McClellan continue to drive her car? A Indeed, she did. Yes, sir.

Q And at what period did she stop driving her own car? A Well, I think after she had a cataract operated on on her eye,—she had a cataract removed from her eye.

Q What year was that? A I think it was 1947.

* * * *

Q Now, did there come a time shortly after your marriage when some suggestion was made as to the
491 execution of a will? A Yes. We talked it over, and after I explained to her about me making her beneficiary to my retirement fund, and my life insurance policy, she says "Well, I certainly want to give you one of these houses, because you have worked very hard and put a lot of your money into the improvements at 3218" where we lived, and she said "It is no more than right that you should have one of these houses, so I intend to make a will leaving you this house."

Q Who brought up the subject of executing a will?
A She did. I filled out those papers, making her beneficiary. I wanted to take care of her. And she says "I will try to be fair and leave you something in case I go first."

Q Do you recall making an appointment with Mr. Malloy for the purpose of preparing these joint wills? A I do.

* * * *

492 Q What, if anything, happened in your presence after you both arrived in Mr. Malloy's office?

A Why, Mr. Malloy was there, and we met Mr. Malloy, and I introduced my wife to Mr. Malloy. And we sat and talked for a minute and then Mr. Malloy said "Well, I understand you both want to make a will." That is what he understood from my telephone conversation.

I said "Yes, sir, Mr. Malloy. That is what we are down here for." So he went into detail about the wills, and asked her what she wanted. She told him, and he took it down in those notes that you saw this morning.

MR. DAVIS: May I have those exhibits, Mr. McCann, please?

(The exhibits were handed to Mr. Davis.)

BY MR. DAVIS:

Q Are these (showing to witness) the notes you refer to, that Mr. Malloy took down? I show you Defendant's Exhibits Nos. 13 and 14. A That looks like the paper he had in front of him. I remember that yellow paper he had in front of him, and writing the questions and answers down, as to what Mrs. McClellan wanted, and what I wanted.

Q After Mr. Malloy received instructions from
493 both of you as to the contents of your wills, who actually typed up the form, the final form of the wills? A Well, I think Mr. Malloy did it himself. I believe his typist was off that day, and I believe he typed the wills up himself.

Q Were you present when two other attorneys from the same floor came in to witness both of your signatures? A I was. Yes, sir.

Q And were those signatures all affixed in the presence of each other? A They were.

* * * *

Q Did Mrs. McClellan and yourself, prior to executing the wills, make any statement to Mr. Horowitz and Mr. Baker as to what these papers were that you were about to execute? A Oh, we told them that they were wills. Mr. Malloy brought them in to witness the wills. We showed them the wills we wanted and asked those two men to witness the wills.

Q Did there come a time shortly thereafter, that is, after November 1, 1946, the date the wills were
494 executed, that the fact of their execution was brought to the attention of Mrs. McClellan's daughter, Mrs. Newby? A I understand she told Mrs. Newby about this three or four days after the wills were made out.

Q Did Mrs. Newby ever discuss with you the matter of the execution of these two wills? A I can't remember ever doing that.

* * * *

Q Did there come a time approximately two years after your marriage, in the spring of 1948, when Mrs. McClellan sold one of these two homes on Klingle Road?

A Yes. He come out there—

Q No. You are getting ahead of me. Never mind Marshall. You can answer yes or no: Did there come a time when she sold one of the houses? A She did.

Q When was that? A That was in April of 1948.

495 Q Now, will you describe to the Court and the Jury the circumstances leading up to and surrounding the sale of 3216 Klingle Road? A It was along in March, I believe, some time. I was working in the office, working all day long, as I always do. I come home that evening for supper. My wife was sitting downstairs. She told me that an old-time friend of hers by the name of Newton—Newty, she called him,—she said that he come out to see her, as he had a prospect to buy a house about the size of 3216, and wanted to know if she would sell it.

So I says “What did you tell him?” And she said “Well, I told him to get the bids on it and see what kind of a price he could get for it, and I would think it over.”

So he apparently found out and told her what he could get for it—twenty-one five. And we consulted, as all men and their wives do about anything such as a transaction of that magnitude. So we decided to sell the house for twenty-one thousand five hundred dollars.

Q Now, at that time, were both of these properties, 3216 and 3218 Klingle Road, encumbered by a deed of trust, or mortgage? A They were, both of them.

Q Which one of the two had the higher mortgage on it? A 3216.

Q At that time, do you recall the exact amount
496 of the mortgage on 3216? A I think it was seven thousand five hundred dollars.

Q What was the mortgage on 3218 at that time? A Four thousand.

Q Just a little more than half? A Yes.

Q Did you have anything to do with respect to inducing Mrs. McClellan to sell 3216? A None whatsoever. I told her it was her own home. I said "Nobody can make a decision as to selling the home except yourself. The deed and title rests with you."

Q Were you required to sign the deed with Mrs. McClellan? A No, sir.

Q And did Mrs. McClellan personally appear at the Lawyers Title Company of Richmond to consummate the sale? A She did. Yes, sir.

Q Were you present on that occasion? A I was.

Q And did Mrs. McClellan make the usual formal acknowledgment before the Notary Public, Mr. Dade? A She did.

Q That that was her free will and act? A That that was her free will and act. Yes, sir.

Q As the result of the sale of 3216 Klinge
497 Road, do you recall the net amount received after paying transfer stamps, commission, and the trust?
A Yes, sir. Twelve thousand and some—twelve thousand and some odd hundred dollars. I forget what it was. But we got a deposit.

Q It is reflected on the settlement sheet? A Yes, it is.

* * * *

Q Who was that check made payable to? A Anne G. McClellan.

Q Did Mrs. McClellan endorse it? A She did.

Q After endorsing it, what happened to that check? A Deposited with the Liberty National Bank.

Q In your joint account? A In the joint account.

498 Q At that time did Mrs. McClellan have any other bank account? A No, sir. She had none.

Q Now, shortly after the sale of that property, Mr. McClellan, while you were at work did you receive a phone call from your wife? A I did.

Q Can you fix more definitely the time after April 8, 1948, that you received that call? A Well, I think it was around one o'clock—twelve or one o'clock.

Q In the afternoon? A In the afternoon.

Q What was the nature of that call. What were you directed to do as the result of it? A Well, she was very alarmed and nervous. She told me to come home at once. She said "Virginia is out here raising hell." So I signed out and jumped in my automobile and come to 3218 Klinge Road. I opened the door and my wife was sitting in a chair, crying, and here was Virginia, waving a paper in one hand, pulling her hair and hollering.

I said "What is wrong here?". Virginia says: "Mother sold my house and won't give me the money." She said "I ought to have that money. Mother left me that house, 3216, and I want my money."

499 I said "That is your mother's money. It isn't my money. It isn't yours. Your mother sold the house. It is her house. It is her money."

Then Virginia said "If she won't give me my money, will she sign this paper"—authorizing the money to be put in a joint account and none of it could be drawn out without her signature, Virginia's signature.

And my wife was nervous, and asked me what she should do about it. I said "It is up to you to make the decision. It is your money."

Q Did you see this paper Virginia was waving? A I didn't read it. She had it in her hand. I didn't read it.

Q She described it as a paper authorizing the opening of a joint account between her mother and herself, and her mother couldn't use the money unless she consented?

A That is right. * * *

* * *

500 Q Give us a little more in detail the conversation you had on that occasion with Mrs. Newby?

A I asked Mrs. Newby, I said "Who thought up this crazy idea. Does your husband, Bob, know about it?" I said "Bob is a pretty sensible man, he works with the F.B.I." I said "Did he send you on this mission?" "for you to tell your mother to give you the money?" She said yes. She said "I will get a lawyer." So she went out and slammed the door. So that was the end of that fracas.

Q Did your wife or yourself ever hear from a lawyer thereafter? A No, sir; nothing concerning that occurred.

* * * *

501 Q Now, did there come a time, Mr. McClellan, when your wife had some condition in one of her eyes? A Yes, she had a cataract removed from one eye.

Q What year was that?

* * * *

A Yes, we did. That cataract was removed after we sold the house, in 1948.

Q Getting back to the question I asked you, had you both planned a vacation prior to the removal of the cataract? A Yes, we always planned our vacation during the summer months.

Q Was the vacation in question postponed or forestalled due to the cataract operation? A Yes, that is what postponed it.

Q Mr. McClellan, what was your wife's habits as to social engagements after your marriage to her in
502 October, 1947? A Well, outside of having some friends come to the house and going out and visiting other friends, and playing cards, we had one friend, an old-time friend of hers that has never been mentioned yet. Her name is *Mitt Hoffman*. She lived on P Street, and she was quite a bridge player. She used to play bridge with my wife. She said she was one of the best

bridge players she ever played with in her life. So we would go down and play bridge. She would have some of her friends come in and we would play bridge at her home.

Q On an average of how many times a month, or how many times a week would you and Mrs. McClellan play cards, either at your home, or at the home of friends?

A Well, we played cards in our home for a long while there, oh, probably once or twice a week, but most always on week-ends we had some friends over there. She used to play penny ante poker.

* * * *

503 Q Reverting back for a moment, Mr. McClellan, to Exhibits Nos. 1 and 2, I direct your attention to the fact that in Item 2 of Mrs. McClellan's will, she left her son, Marshall M. Morgan, Jr., a legacy of \$500.00.

I direct your attention also to the fact that in Item 1 of your will, Exhibit No. 2, you left your son, William A. McClellan, a cash legacy of \$500.00. A That is right.

Q Can you explain, or will you explain to the Court and the Jury what led up to the similarity of those
504 two bequests? A Well, I think she told me she wanted to leave Marshall Morgan \$500, so the will wouldn't be contested, because she wanted to see that Virginia got more than he did. And that put the idea in my head, so I thought I would do the same for my son.

Q So you left your son \$500.00? A I left my son \$500.00, and I left my wife the balance.

Q There has been some testimony, Mr. McClellan, that after the sale of 3216 Klingle Road, that the furniture from 3216 was moved into 3218. A That is correct.

Q Did all of that furniture that was in 3216 Klingle Road remain in 3218 after it was removed to 3218? A No. Virginia come down there with her daughter, Anne. Anne was just getting married, or something, and her mother let her go out and pick out what furniture she

thought she wanted. So she went out and picked out what furniture she wanted,—some carpet and rugs—she give her anything she asked for.

So I had these two boys who worked at the office, Edwards and Lewis, that you saw on the witness stand this morning,—I asked them if they could get a truck to move this stuff out to Virginia's, because these local vans and everything are so expensive. So I tried to cooperate with Virginia—wanted to do anything I could for her—no animosity existing. So these two boys got this truck and loaded on all this furniture that was in 3218 and took it out to Virginia's house and unloaded it there and placed it around where she wanted it put.

And they come back. I said "Did Miss Virginia pay you anything?" They said "No." I said "How much is the charge?" So I paid the fifteen bucks.

Q How big a load of furniture was that? A Quite a lot of furniture. I didn't count the pieces, but it was rugs, and chest(s) of drawers, and tables and chairs and beds, I believe.

Q Now, will you describe to the Court and Jury the attitude of Marshall Morgan, the son, toward his mother, shortly before and after your marriage to Mrs. Morgan?

* * * *

506 THE WITNESS: Well, when I was first married, there was no opposition raised by him at all. We got married. Well, he come around there and visited us when he was drunk, come there for money, and I wouldn't leave him in the house. And Virginia knew that we had several fights. We would tell Virginia about it.

MR. McCANN: May we ask that all be stricken?

THE COURT: That is not what he asked you for, Mr. McClellan. He wants to know the attitude, as I understand the question—the attitude of Marshall Morgan toward his mother. Isn't that right?

THE WITNESS: I think I answered that question wrong.

THE COURT: I think you did, too. So let's start fresh again.

THE WITNESS: Well, his attitude toward his mother was not like that of any son that loved his mother.

* * * *

507 THE WITNESS: He came out on several occasions when he was drunk.

* * * *

THE WITNESS: He came out there several times absolutely drunk, started fights with his mother, knocked her down several times, and on several occasions I had to beat him up, and call the police, and have him arrested.

BY MR. DAVIS:

Q Was there one time in the spring or summer of 1948 when he attempted to make an assault on his mother with a weapon of any kind? A Yes, sir. There was. We had a railing out front. I made it, and built it myself out of—

508 Q A what? A A railing, to walk down the stairs, a 3 by 3, or 2 by 4, small piece of wood. And he come there—did you hear me, Mr. McCann?

MR. McCANN: Yes.

A (Continuing) He come out there with that drunken attitude and he grabbed down this railing and come in the house, drunk. His mother was sitting in a chair, and he had it over his head (indicating) like that, ready to hit her with it. I was sitting over here (indicating), and I grabbed him, knocked him out of the door, and took the stick and beat him over the back, and chased him out of the house. He was driving a taxicab at that time, and he jumped in this taxicab and beat it.

Q On how many occasions, to your personal knowledge, did he make physical assaults upon his mother?

A Well, I know of three. She told me of a couple of assaults he made on her before I was even acquainted with her.

Q Now, what was Marshall's attitude toward his mother with respect to finances? A Well, he had just been cadging money from her all of his life, just a regular leech, never worked much. (She) bought him a taxicab, tried to put him in the taxicab business. He would get drunk and have his license taken away, sell the car, spend the money, and get in jail. We had to go take him out of jail. He was in continuous trouble. * * *

* * *

509 Q Now, did there come a time as the result of
this assault with a 2 by 4 that you found it neces-
510 sary to swear out a warrant for Marshall? A I
did that, right after the sale of the house.

Q Will you give us the circumstances of that occasion? A I certainly will. He called on the telephone. At that time we had a Mary Semley working for us, doing part-time work. Let's see—and Jimmy Baxx, he was a roomer in the house. So he called up and he told me, he said "I am going to come out and blow that damned house up."

And the night before he called me up—that is right, the night before, about midnight, he called me up. He said "Hell, I am going to come out there and kill you and my mother and the whole damned family, all you people in 3218."

The next day this colored girl, she answered the telephone, and I said "What did he say?". She said "Boss, he's going to come out and kill us all." She says "I's not going to stay here. I's going to go home."

So I went down and swore out a warrant against him, and I had Mary Semley and my wife and Jimmy Baxx and myself as witnesses. We went down to Fay's office.

Q To the District Attorney's office? A To the District Attorney's office, and swore out a warrant for his

arrest, and it was served on him, and he was put in jail, and let out, on bond. The next day, when the trial come out, why, Mary Semley just vanished out of the house, just packed up and left. Nobody didn't know she was gone, until we looked about getting the meat. My
511 wife was in bed, said she never heard anybody come down. She had a room on the third floor. She carried all of her stuff down, and put it in some taxicab and left. And my wife told me she didn't even know she left, she couldn't hear a sound. So that was the end of that episode.

Q Was that the occasion when Marshall Morgan signed the paper identified as Defendant's Exhibit No. 9, on April 22nd, 1948? A That is right. And we—

Q You notice the names of two witnesses on this paper, Harry J. Ahern and Thomas J. Ahern, Jr.? A Yes, sir.

Q Who are they? A They have an office on Fifth Street.

Q Lawyers? A They were appointed by Judge Ready.

Q To represent whom? A Mr. Marshall Morgan. So when the trial come up, his mother was there as a witness against him. So was Jimmy Baxx and myself. We couldn't find Semley. She beat it. So before the trial come up, why, Fay inquired as to the warrant, as to the reason for it, whether it was truthful or not. I remember him asking Marshall Morgan, did he say he was going to kill me and the family. He said "yes, but I was only
kidding." So I remember Mr. Fay or one of the
512 District Attorneys saying "How do we know you are only fooling?" And he took the warrant and wrote "Mental" on the back of it.

So when the case came to trial, why, Judge Ready appointed these two lawyers to represent Marshall Morgan. So these lawyers come to me and asked me if we couldn't reach some kind of settlement. I said "No, we have been

having trouble. I want to bring it to a close for once and always."

So his mother asked me what was going on. I told her. She said "I don't feel like I want to get on the stand. Maybe he will be better if he will go off." I told them if he would sign a paper agreeing not to molest his mother, me, or anyone in the house, I would nolle prosequere. So he did, and that is the paper. He said he would keep away from the house and never threaten to kill me, his mother, or anyone in the household.

* * * *

514 Q Directing your attention now to last summer, when your wife was a patient in Sibley Hospital, did Marshall Morgan visit his mother at the hospital at that time? A He did.

Q Were you on any of those visits, present at the hospital? A I was, on numerous occasions.

Q How many times during the entire period she was at Sibley Hospital, did he visit her? A Well, I would say about eight or ten times.

Q On any of those occasions, did he make any unusual request of his mother, or of you?

* * * *

516 MR. DAVIS: * * * As long as Your Honor
517 has allowed all of that to go in, I think the full picture should be developed, to show the attitude of the son toward his mother, the question of filial devotion, her attitude toward him, even up to the time of her death. I think the full picture should go in.

THE COURT: I don't want to cut out any part of the picture that has any possible bearing on the case. I think that I will err on the side of latitude, if it be error, and let it come in. I don't know that it does have any bearing on it.

* * * *

THE WITNESS: Yes, he did. He seemed to have the habit of every time he came to visit his mother in the hospital, he would get some money off of her, ask her for some money, five, ten,—various amounts.

* * * *

518 Q On these occasions you have told us about, were you present when Marshall Morgan made these demands of his mother in the hospital? A I was. It seemed like she would run out of money, and he would hang around and wait until I would come up. Every time I would come to visit my wife in the hospital, I would find him sitting there, and just waiting for me to come in. And she would say "Well, Mac, would you please give Marshall some money. He hasn't got a dime to eat on" or "His room rent is due."

He kept pestering her. I would give him three dollars, and he would say "Well, that is not enough to eat on today and tomorrow. If you don't give me some more money I will be back here tomorrow."

* * * *

519 BY MR. DAVIS:

Q Mr. McClellan, during any of these visits of Marshall Morgan with his mother in the hospital, did he ever bring her flowers, candy, or any other remembrance?

A No, he just—

MR. McCANN: I object, as strictly incompetent, irrelevant and immaterial.

THE COURT: Oh, let's get ahead. The answer is no. All right.

THE WITNESS: He was strictly on the receiving end.

MR. McCANN: Just a minute. I ask that that be stricken.

THE COURT: Of course I will strike it. Mr. McClellan, I have given you rather wide latitude. Please don't volunteer your views, which are perfectly obvious.

THE WITNESS: O. K. Thank you.

* * * *

Q Mr. McClellan, do you have any personal knowledge of the extent of your wife's education? A I have heard her tell me that she went to some college down south, around Greensboro, or some place down there.

Q She was more than a high school graduate, I take it? A I know she was.

520 Q Did she belong to any organizations? A She belonged to the D. A. R.

Q That is the Daughters of the American Revolution? A Daughters of the American Revolution.

Q In the entire time that you knew Mrs. McClellan, both before and after your marriage, up to the time of her death, have you ever heard her use any profanity?

A That is one thing I can truthfully say, I never heard her use any profane language whatsoever. She was a highly educated, meek, mild lady, and I never heard her use any profanity whatsoever.

Q You have heard the testimony of her daughter, Mrs. Virginia Newby, that on one occasion she called Mr. Newby a God-damn son-of-a-bitch. Did you ever hear your wife use that sort of language? A I have never heard her use it. It is hard to say, but I don't believe she ever did say that.

Q Have you ever heard your wife refer to anybody's relative or other acquaintance as a bull-headed Dutchman?

* * * *

A No, she has never used that language.

Q While we are on this subject, you heard the testimony of Mary Semley, the maid. Did you ever call
521 her a G-d s-o-b? A I certainly did not. I never use that kind of language to men, and especially not to women.

* * * *

MR. DAVIS: I call upon counsel at this time, if they have Civil Action No. 30176, McClellan versus McClellan. (Mr. Dorsey handed papers to Mr. Davis.)

* * *

Q I show you this file, which is an official court file of this Court, Mr. McClellan, and ask you about this first paper. Is that your signature? A It is.

Q And that is a complaint for absolute divorce in which you are the plaintiff and Gertrude R. McClellan is the defendant? A That is correct.

Q She was your first wife? A She was.

Q And that was filed in this Court August 13, 1945? A Right.

Q And at that time, who was your attorney? A Frederick Wilson.

Q Frederick R. Wilson. Did this case proceed 522 to final judgment? A It did.

Q And that final judgment was signed by Judge T. Alan Goldsborough of this Court on April 17, 1946? A That is correct.

Q And became automatic by its terms six months thereafter? A That is correct.

MR. DAVIS: I offer this file in evidence, if the Court please, as the next numbered exhibit.

* * *

MR. McCANN: No objection.

THE COURT: Let it be considered as evidence.

* * *

523 BY MR. DAVIS:

Q Now, Mr. McClellan, prior to the execution of your will and Mrs. McClellan's will on November 1st, 1946, had you ever met, or did you ever know, Thomas M. Baker and Louis Horowitz? A I did not.

Q They were total strangers to you on that date? A Total strangers. Yes, sir.

Q You have heard the testimony of Mrs. Newby—I am not sure—it was either Mr. or Mrs. Newby—that two days before your wife's death, one of those two witnesses observed you coming down the steps with a highball in

your hand, at which time you were alleged to have stated "All she needs" (meaning your wife) "is one more drink". Did you, or did you not make such a statement?

A I certainly did not say anything like that about her. I was taking care of her as a nurse, and they were only there to visit us.

524 Q Now, on that point, did you have a night nurse after Mrs. McClellan's return from Sibley Hospital? A I did not.

Q Did you have a day nurse during the entire time after her return from the hospital up to the time of her death? A I did, a day nurse.

Q During the day, you were employed during that entire period? A Yes. I did have a nurse later on, after the first nurse I had, which I paid her forty-two dollars a week, and I got hold of another nurse, and I paid her thirty dollars a week, and I would give her a few dollars extra to stay some nights if she could, so I could get a good night's sleep, because I had to work the next day, and on different occasions she would stay and work at night for me once in a while.

Q But you did have a day nurse on duty for the entire time from her return from Sibley Hospital, to her death?

Q Who did practically all the night nursing during that time? A I did.

Q Will you describe what your duties as night nurse were, what you were required to do? A Of course the day nurse would bathe her and everything. The only thing I had to look after was bed pans, and bringing her up some food when she wanted it.

525 Q Did you maintain vigil during the night in your wife's room? A I did. I slept in the same bed with her, so if she wanted anything I could get it without much trouble, because she couldn't walk.

Q Now, going back for the moment to the incident in 1948, March and April of 1948, concerning the sale of

3216, did your wife assign any reason to you for selling that one of the two houses? A Yes, she did. She had a very good reason for wanting to sell 3216 Klingle Road. After her friend, Mr. Newton Jeffress, called on her to advise her that he had a prospect for the sale of 3216 Klingle Road, she talked to me. She said "I will be glad to get rid of 3216 because it has been just a lot of agony and trouble to me."

There was a mortgage on it of seventy-five hundred dollars, and she had to pay the interest on that mortgage twice a year, and the taxes were high, of course, and then the house was getting old, and the tenants were continually complaining to her about it, and every time they would bring a check over for the rent, they would have some complaint—"We are not getting enough hot water." "I need a new hot water furnace put in so we can have more hot water". Next time they would have some other trouble. She said "I will be glad if I can get rid of that house and have a little peace of mind."

Q In other words, 3216 was a source of constant irritation to her? A It certainly was.

Q After that sale was consummated at the Lawyers Title Insurance Company of Richmond, and the net proceeds of the sale were delivered to Mrs. McClellan, can you state how those proceeds were invested? A We deposited the check to our joint account, in her name and mine. The proceeds were spent for various things, household expenses, and we bought 5,000 of Liberty bonds.

Q War bonds, you mean? A War bonds, and, of course, a good bit of that money went for these various expensive doctor deals that we had to go through, operation(s), and so forth. We spent quite some money down to Atlantic City on these various trips. She got to the point where she said "Let's have a little fun out of life." She said "I have been working hard and striving and

doing things for everybody else. I am going to start to do something for myself."

Q You did take a trip in 1948, did you, to Atlantic City,—you and Mrs. McClellan? A Yes.

Q How long were you on that trip? A I think we were there ten days or two weeks—about two
527 weeks.

Q Did you take any other trips? A We went down to Ocean City, Maryland for a couple of weeks down there, and Colonial Beach.

Q I will show you this exhibit, Defendant's Exhibit No. 8, a snapshot of your wife. Do you know who took that picture? A I took that picture. We were walking down the Board Walk. There is a good picture of her. You can see the serenity of her face. I wish you would show that to the jury.

* * * *

Q Now, out of part of the proceeds of this sale, was a new car purchased? A There was. Yes, sir.

Q What make of car was it? A Nash—Nash Ambassador.

Q And in whose name was the title of that car taken, and the registration made? A In my name, Mr. Alfred McClellan.

Q Did your wife assign any reason for taking
528 title to that car and placing the registration in your name alone? A Yes. That is what she suggested. She said, being as I am a Government employee and my salary could not be attached for any accident, for any great amount, which might occur to me—occur to the car, why she said "They would probably put a levy on our home if I had it in my name." Of course I took it in my name—took out the usual insurance.

* * * *

530 Q Will you tell us, at that time, now, Mr. McClellan, directing your attention to 1948, after the

sale of 3216, what, if anything, Mrs. McClellan said to you as indicating her attitude at that time? A She said to me that she was getting in a very nervous state of mind. She said her son threatened to kill her, and her daughter, Mrs. Newby, wanted her money.

Q Now, there was some testimony yesterday, Mr. McClellan, and again I am not sure whether it was
531 Mr. or Mrs. Newby, that you made a statement to either one of those two witnesses that your wife had issued some seventeen checks totaling \$77, I believe the quotation was, in the two weeks prior to her death, for liquor. Did you or did you not make such a statement? A Yes. I was talking about the checks that were issued—I forget how many, but I know they amounted to between seventy-five and eighty dollars—and they were not all for liquor. Most of them were used for liquor, but some of them were donations.

Q Did you say there were 17 of them? A I don't believe I said seventeen. I forget how many checks there were, but I know they totaled around seventy or eighty dollars.

Q I show you what has already been admitted in evidence as Defendant's Exhibits 5 and 6. Were those two of the checks about which you were talking on that occasion to either Mr. or Mrs. Newby? A Yes, they were.

Q And those two checks were cashed by Mrs. Newby at the Safeway Store in Chevy Chase, Maryland? A That is correct.

Q I show you three checks that were identified as Defendant's Exhibits 10-A, B and C, dated, respectively, October 4th, October 9th, and November 13th, 1950.

532 Were those three of the checks included in the group which you mentioned to either Mr. or Mrs. Newby? A They were.

Q And two of those checks, 10-A and 10-B were cashed by Marshall M. Morgan, and 10-C by Higgins Drugstore?

A The cashing of that check was turned down by the bank, and Higgins Drugstore called me up and told me they had a check the bank wouldn't honor, on account of Mrs. McClellan's signature, that you couldn't read her signature. She was probably in a stupor at that time, but somebody got her to sign it. I went out and picked up the check. It says "All endorsements cancelled." They wouldn't cash the check. Her name is almost illegible there.

Q That check was not cashed, was it? A No, it was not cashed. These other checks were cashed. But that is not her writing up here. * * *

* * * *

523 MR. DAVIS: At this time, if the Court please, I offer in evidence Exhibits 10-A, B and C.

* * * *

534 THE COURT: All right. I will let them in. Admitted.

(Thereupon, the checks previously identified as Defendant's Exhibits Nos. 10-A, B and C, respectively, were received in evidence as such.)

* * * *

535 Q Now, among this same group of checks you mentioned to Mr. or Mrs. Newby, whichever it was, I show you four more checks, Mr. McClellan:

The first one dated September 26, 1950, made payable to cash in the amount of \$12.00:

The second, dated October 5, 1950 in the amount of \$2.99, made payable to the Macomb Liquor Store;

The third dated October 10, 1950, made payable
536 to Cash, in the amount of \$5.00, cashed at the Macomb Liquor Store;

And the fourth, dated October 24, 1950, made payable to Cash, in the amount of \$10.00, and cashed at the Macomb Liquor Store.

Were those four checks among those about which you were talking when you had this conversation with Mr. or Mrs. Newby? A They were. Yes, sir.

MR. DAVIS: I offer these in evidence, if the Court please.

* * * *

THE COURT: 19-A, B, C and D.

(Thereupon, the four checks above referred to were marked Defendant's Exhibits Nos. 19-A, 19-B, 19-C, and 19-D, respectively, and received in evidence as such.)

* * * *

537 Q Let me ask you the direct question: Is the handwriting comprising the name of the payee, the date and the amount, the handwriting of Anne G. McClellan? A It is not—absolutely not. She couldn't hardly write her name.

Q Are these nine checks, totaling \$85.00, and with the one not cashed would appear to amount to \$80.00, are those the checks you were referring to when you
538 had the conversation with Mr. or Mrs. Newby?

A Yes, sir. They were.

Q Now, Mr. McClellan, after the death of your wife, was there any financial assistance offered to you by either her son or daughter to help defray the funeral expenses and the purchase of the burial site?

* * * *

A (Interposing) None whatsoever.

* * * *

539 Q Mr. McClellan, I think when we recessed, we were discussing the matter of funeral expenses. Who paid the funeral expenses for your wife? A I did.

540 Q At that time, did either you or your wife have a burial plot? A We did not.

Q Did you buy a burial plot? A I did.

Q In what cemetery? A Cedar Hill.

Q Who paid for that? A I did.

* * * *

541 Q Now, Mr. McClellan, reverting back for a moment to the matter of these checks, during the period covered by these exhibits, these checks were all drawn on the joint account you have referred to, were they not? A They were.

Q During that period, did you and your wife have printed, checks for use on your joint account? A We did.

* * * *

Q When did you and your wife start using this form of printed check on your joint account at the Liberty National Bank? A Soon after we were married.

Q And after your wife's return from Sibley
542 Hospital, did you take care of all of her financial wants, all of her needs? A I did.

Q Medical expenses, and so on? A I did.

Q Was there any need for her to have issued checks during that period of convalescence? A No, sir.

Q What, if anything, did you do to see to it that she did not get alcoholic beverages? A Well, along in the early part of October, I saw that she was getting too much liquor. And I think one of the nurses sort of co-operated with her in getting it. They would put it in different places—underneath her pillow. And I told this nurse that if she did not stop getting liquor for my wife, that I would fire her. And she said "Well, that puts me between the devil and the deep blue sea." She said "Mrs. McClellan told me that if I didn't call up and get liquor for her, that she would fire me."

Q Did Mrs. McClellan have access to a book of these checks, check forms? A I took it away from her when I found out she was issuing too many of them to the Macomb Liquor Store. I told her I would get her what

liquor she desired, if it wasn't in too great quantity.

543 MR. DAVIS: I offer this check form in evidence at this time, if it please the Court.

THE COURT: Any objection?

MR. McCANN: No objection.

THE COURT: Defendant's Exhibit 22.

* * * *

Q Did you have any knowledge that these checks had been issued until they were returned to you in your bank statement? A I did not have any knowledge of those checks being issued. When I got the statement from the bank, I was sort of dumbfounded. I thought I had eighty dollars more in the bank than I did. And looking over the checks, I found these checks in it which totaled
544 around eighty dollars, I believe, or eighty-five dollars.

Q From the time of your marriage, Mr. McClellan, and especially after your wife's cataract operation, who paid the utility bills in your home? A I took care of all such bills.

* * * *

Q Did you examine the bank statements every month as they came through? A They would come to the house addressed to both of us, Anne G. McClellan and Alfred D. McClellan, and she would open up the envelope and look over the statement, and look over the checks, and turn them over to me.

Q Now, there has been cited as one instance of alleged unsoundness of your wife's mind, that on one occasion Mrs. Newby found her mother's glasses in the icebox. Do you have any personal knowledge of that ever happening? A I have not. That must have happened before we got married. But I don't doubt a bit she found her eye glasses in the icebox, because when her and her children come to visit her mother, that is the first place they run to, to the icebox.

* * * *

547

Cross-Examination

* * * *

548 Q Now, you were married when you first met
Anne G. McClellan, were you not? A No, I don't
549 think I—I didn't have my final decree, but we
had a separation.

Q At the time you met her? A Yes, sir.

Q That was in the spring of 1945? A Yes.

Q And you were not in a position at the time that
you met her, to propose marriage, were you? A I was
not.

Q Who made the first suggestion about your getting
married? A Well, that is a kind of a hard question. It
seems to me like she thought it would be a good idea,
because she had no one to take care of the little duties
around the house, and she said she needed companion-
ship, just as bad as I did. We both had been married
and had children, and were living alone.

Q Did that conversation with her come up before you
moved to the house? A I couldn't very well answer
that. It is too remote.

Q Did it come up on any of these automobile trips
you had with her, when she used to come down to the
office, before you moved to her home as a roomer? A
Possibly.

Q The suggestion of marriage was made by her,
550 on the basis that you were both old, that your chil-
dren were raised, and that you both needed com-
panionship. Is that correct? A That applied to both
of us. Yes, sir. That is correct.

Q That is right? A Yes, sir.

Q Can you tell us how long after you met her it was
before this question of marriage came up?

* * * *

THE WITNESS: I couldn't even attempt to answer that question. I don't know.

* * * *

Q But it was before you moved into the house? A I imagine it was.

Q Did you agree to marry her before you
551 moved into the house? A No, I don't believe we had any agreement to that effect.

Q Did you have an understanding to that effect? A No, I don't think so.

Q When it came to the transfer which you made from Wisconsin Avenue to her home, who suggested that move? A Well, I think it was mutual, more or less. She said she had an empty room over there in her house, and she couldn't understand why I could not use that room as well as the room we had over there on Wisconsin Avenue. And she said it would be more convenient, and I would have the use of the house, and it would be much nicer—and so it was.

Q So she suggested that you move from Wisconsin Avenue to her home? A Well, I couldn't exactly say that. It has been so long ago. I think it was sort of a mutual agreement.

Q But she did say "I have got an empty room, and it would be more convenient if you moved from where you are, over here", is that correct. A Yes, words to that effect, yes.

Q Words to that effect? A Yes.

Q Now, at the time Mrs. Morgan suggested marriage to you, what sources of income did she have?
552 A She had alimony of a hundred dollars a month from her husband, and I think she was getting—we were living at 3216 at that time—she had 3218 rented for, I don't know, around a hundred and fifty, a hundred and seventy-five dollars a month.

Q And she had a roomer there? A She had a roomer.

Q And I believe the roomer has testified on the stand she was paying \$60.00 a month? A That is for her board and meals; yes, sir.

* * * *

554 Q Mr. McClellan, I hold in my hand now, Civil Action No. 30176, McClellan versus McClellan, which is the record in the District Court of the District of Columbia of your divorce proceedings, and I shall read the sixth paragraph of your petition: (Reads:)

"That plaintiff and defendant have been voluntarily separated from bed and board for five consecutive years without cohabitation"—

That was paragraph 5. I beg your pardon. This is paragraph 6:

555 "That the plaintiff has resided at the following addresses since the date of said separation and for the length of time stated below:

"3209 Wisconsin Avenue, Northwest 1 year

"McLean Gardens 1 year

"4505 Ellicott Street, Northwest 3 years

"and his present address, 3218 Klinge Road, Northwest for 1 year; that all of these addresses are located in the District of Columbia; that the plaintiff is informed and believes that the defendant has resided at her present address, 243 Rock Creek Church Road, Northwest in the District of Columbia for the past five years."

And this document is dated the 13th of August, 1945, and sworn to by Alfred D. McClellan before Robert A. Miller, Notary Public.

Now, Mr. McClellan, after hearing that document read, I will ask you what time you moved to Klinge Road? A It was in the fall, wasn't it, of—it may have been around in August. I can't recall the exact date.

Q Of what year? A 1945.

Q Didn't you hear me read your own sworn complaint to the Court on August 13, 1945, that you had resided on Klingle Road for one year last past? A Yes. I don't think I was in 3218 Klingle Road.

Q I show you this petition, and ask if I am
556 reading it correctly: "And his present address, 3218 Klingle Road Northwest for one year". Did I read that correctly? A You did.

Q When did you move to 3218 Klingle Road? A Well, I must have some of those dates mixed up some place or other, but I know it was in the latter part of 1945 when I left 3409 Wisconsin Avenue.

Q You know that you moved to 3218 Klingle Road the latter part of 1945? A Yes.

Q And yet on the 13th day of August, 1945, under oath, you stated that you had lived at 3218 Klingle Road for one year. A I may have made a mistake.

Q When did you make the mistake? A I don't know, I am telling you.

Q Did you make the mistake on this witness stand, or when you said that under oath in 1945? A I think, at the present time I think I am telling the truth.

* * * *

560 Q Now, it was also provided, was it not, in this final decree that you could not be married for six months after the 17th day of April, 1946? A I think that is correct.

Q Is that correct? A I think it is.

Q And you were married six months and two days thereafter, on October 19th, to Anne G. Morgan? A That is correct. We got married as soon as we could possibly be legally married.

* * * *

561 Q Isn't it a fact that in your previous testimony this morning, you stated that at the time this discussion with Anne G. Morgan took place with respect to

marriage, that your decree had not become final as of that time, but you had already instituted your divorce action? A That is right, absolutely right. Yes, sir.

Q And that was all before you moved into the house with her? A I think that is correct.

Q Now, did you give a deposition on the 21st of March, 1951, in connection with the Estate of Anne G. McClellan, in Mr. Dorsey's office? A I did.

* * * *

562 Q Did you give the following answers to the following questions by Mr. Dorsey, on the 21st of March, 1951, under oath?

* * * *

563 BY MR. McCANN:

Q (Reading from deposition, as follows:)

"Q To whom were you married before?

"A Her name was Miss Beguin.

"Q Is she still living?

"A Yes.

"Q Are you now divorced from her?

"A I am.

"Q When did you institute divorce proceedings from your first wife?

"A I did not contest proceedings.

"Q I take it then she instituted divorce proceedings?

"A Yes; she did.

"Q And when did the divorce become final?

"A 1946.

"Q 1946?

"A 1945, six months after. I had to be away from her five years, and it brought it around to the early part of 1946. I was separated from her for five years, and I had to wait six months before I could get married again.

"Q On what grounds did your wife divorce you?

"A She had a lot of trumped-up stuff. I did not want

564 to contest it because I did not want to injure the reputation of my son.

"Q What were the grounds?

"A I think cruelty.

"Q Who was your attorney in the divorce proceeding?

"A Mr. Wilson.

"Q Did you have any other attorney in your divorce proceedings?

"A No, I did not; I did not contest it. I never went to court."

* * * *

566 Q I read from what was in the deposition? A Yes, sir. You did.

MR. McCANN: Now, may it please the Court, turning to page 24, which was the examination conducted of this witness by Mr. Davis, in connection with the same subject matter, I desire to read to him the questions and the answers which appear here, and I will ask him whether he gave the answers to the questions as stated in this document. (Reads from deposition, as follows:)

567 "Q You answered, in the interrogation regarding the divorce between you and your former wife, that the ground was cruelty. That was a guess on your part: wasn't it?

"A She had a lot of other charges trumped up against me, but I did not contest them.

"Q Do you have any personal knowledge of the grounds on which the divorce was ultimately granted?

"A I ought to have, but I can't recall. I think there were several charges.

"Q You mentioned the fact that you had been separated from your former wife for five years.

"A Yes.

"Q Could that have been the ground for the final divorce?

"A That is what it was; yes.

"Q It was an absolute divorce, and not a limited divorce?

"A It was an absolute divorce; yes."

BY MR. McCANN:

Q Did you give those answers to those questions? A I did, Your Honor. I made those answers. That is correct. But I was confused.

* * * *

568 Q And you told in your deposition you weren't even there when it was gotten. That was a mistake? A That was absolutely a mistake.

* * * *

569 Q Now, I will ask you, Mr. McClellan, if Joseph D. Malloy was present when you gave this deposition? A He was.

* * * *

585 Q Now, Mr. McClellan, you testified in your deposition on March 21, 1951 in relation to this suit, that you had not seen your former wife since 1940, when you deeded your home at 243 Rock Creek Church Road to her. Is that true? A I think I saw her once in her lawyer's office. She wanted me to sign a deed to turn the property at 243 Rock Creek Church Road over to her. I met her in her lawyer's office.

Q I am reading from the deposition of the date above referred to, and from page 10 of that deposition, may it please the Court. I will ask this witness whether these questions were asked him, and if he gave the answers as I read them, and if the answers are correct as I read them: (Reads:)

"Q When did you last see Gertrude McClellan?

"A We were separated in 1940. That was when I deeded over the house to her, the house at 243 Rock Creek Church Road."

Did you so testify?

A If I did, I was mistaken, because it was some time after that I deeded the house to her.

586 Q In fact, you deeded the house to her in June of 1943, did you not? A I can't remember the dates.

* * * *

587 Q May I refresh your recollection and ask if it is not a fact that on June 12, 1943 you and your wife, Gertrude R. McClellan, made a deed to Elizabeth V. Franzonia? Is that true? A I don't know the name of the lady. It was one of those legal transactions where I had to deed the property to my wife, but I think the procedure was for me to deed it to some unknown person and then she to turn it over to the wife.

Q And on the same day, this lady deeded it back to your wife. That is correct? A That is correct.

Q Now, Mr. McClellan, will you tell us what your financial condition was on October 19th, 1946, when you married Anne G. Morgan?

588 MR. DAVIS: I object, if the Court please. It is absolutely immaterial if he was broke flat as a pauper, or was a millionaire.

THE COURT: I have ruled that that is admissible. Mr. Davis.

THE WITNESS: I am unable to answer that question. I can't remember five years back how much money I had in my pocket, or how much money I had in the bank. Impossible. I cannot answer that question. I don't know.

BY MR. McCANN:

Q Did you have any judgments against you at the time?

MR. DAVIS: I object.

THE COURT: I think I will permit that.

A There was a judgment pending in the case of Mrs. Betts against me.

BY MR. McCANN:

Q You mean there was a judgment on the record against you? A That is right.

MR. DAVIS: Where else would it be, Mr. McCann?

MR. McCANN: He said "pending", Mr. Davis. He said pending, and I want to straighten out the word "pending".

THE WITNESS: I was paying so much a month on this judgment for years, so I considered it pending at the time. It was finally satisfied. Is that clear?

BY MR. McCANN:

Q How much had you paid on this judgment at
589 the time of your divorce? A I think I had it almost paid up at that time. I can't remember. I don't know how much it was. I was paying it currently.

MR. DAVIS: Just a minute. Will you rephrase that question.

MR. McCANN: I beg pardon.

BY MR. McCANN:

Q At the time of your marriage to Mrs. Anne G. Morgan, how much was due at that time? A I certainly cannot answer that kind of a question. I had been paying on that judgment for several years, \$25.00 a month, and I kept no running diary as to how much money I had every day, at the close of each day, and so forth.

* * * *

600 Q Isn't it a fact that if you seek to make your wife a participant in your retirement that you get 80 per cent of the face value of your retirement, and then your wife gets 50 in the event of your death? A I cannot answer that. I do not know what I did. I give her everything I had. I couldn't do any more. Whatever it was, she was to get it.

* * * *

601 BY MR. McCANN:

Q Now, Mr. McClellan, you testified with respect to,—or, rather, you heard testimony with respect to the first will made by Anne G. Morgan. Now, do you know whether that will was made before she was married to you? A I think it was.

* * * *

602 Q Do you know who prepared it? A No, I don't. I heard some talk about it, but I never saw it.

Q You haven't found it among her papers? A I have not.

Q You don't know what became of it, then? A No, sir.

Q Do you know whether she had an attorney at that time? A If she did, I never heard of it.

Q Did you talk with Mrs. McClellan before going to Mr. Malloy's office about what she wanted done with her estate? A We naturally had a mutual agreement, like all married people do. They have certain conversations and come to some agreement that is satisfactory to both.

Q Now at that time, at the time you were married to Anne G. Morgan on October 19th, 1946, she was very happy, was she not? A I don't know how I can answer. How could I tell when anybody is happy?

THE COURT: All right. You say you can't.

THE WITNESS: That is a stupid question.

BY MR. McCANN:

Q Was she very much in love with you at that time? A Apparently so.

Q Did she have complete confidence in you at that time? A Apparently so.

Q She demonstrated her love for you and her confidence in you by turning over to you the management of her business as soon as you were married, did she not? A No, indeed. I did what I could to help her, like any hus-

band does for his wife. She asked me to pay the utility bills. I would pay them and save her a trip downtown, little helpful matters, such as you can do for your wife.

Q Then you didn't have anything to do with the management of her business? A Absolutely not.

Q Of her business affairs? A No. She was capable of managing her own affairs. I tried to assist her and do what she wanted done.

Q She also demonstrated her love and affection for you, did she not, by executing an instrument on November 1st, 1946, which you now seek to have prevail as her last will and testament? A That appears to be correct. Yes, sir.

Q She further demonstrated her complete confidence in you by nominating you as her executor without bond, did she not? A I think that is in the will. Yes, 604 sir.

* * * *

605 Q Did you in your direct testimony, under the examination of Mr. Davis, testify that your wife, Mrs. Anne G. McClellan, was so grateful to you on November 1st, 1946 for the fact that you had previously assigned your retirement to her, that she wanted to make sure that you would have a home, or a roof over your head as long as you lived, and that was why she made the will that she did make on November 1st, 1946, leaving you 3218 Klinge Road?

* * * *

606 THE WITNESS: Something to that effect. I don't know whether I used those exact words, or not.

* * * *

Q I hand you Defendant's Exhibit No. 16, and ask if that is the assignment that you made of your retirement? A Yes, sir.

Q I ask you whether or not that instrument is dated December—November 4th, 1946? A That is right.

Q Then if you testified that it was because of her gratitude for your having made this assignment, that she made this will, you were in error, were you not?

* * * *

607 Q And it was signed by you and witnessed by witnesses on November 4th?

THE WITNESS: It may have been the fourth, but it bears the stamp of the Civil Service Commission on November 5, 1946. That is when they got it and made it official. It becomes official when they put their stamp on it.

* * * *

608 Q Had you represented to your wife prior to the making of the will on November 1st that you had already made this assignment? A I can't see the significance.

THE COURT: Well, it doesn't matter whether you can see it or not. I am the one to determine whether it is significant or not. Answer the question.

THE WITNESS: Why, the paper is dated, apparently, November 4th, but I still had it filled out long before the date, but I had to get it witnessed on November 4th. I probably filled that paper out long before November first.

BY MR. McCANN:

Q How long before? A I don't know. I know it was before that, because I took it down and had these witnesses sign it. But I had that paper drawn up before November 4th.

Q Did you have it drawn up before your marriage? A I did it before November first.

Q Did you have it drawn up before October 19th? A No, sir.

609 Q You mean to say— A (Interposing) I couldn't use her name until I married her.

* * * *

611 Q Is it a fact that your wife, in the execution of
612 the instrument of November 1, 1946, left the premises known as 3216 Klinge Road to her daughter, Mrs. Virginia Newby? A Absolutely correct. That is in the will.

Q And did you know that? A I certainly did know it. Yes, sir.

Q Is it not also a fact that your wife expressed the desire to you that her daughter, Virginia Newby, should inherit the premises known as 3218 Klinge Road after your death? A Yes, she said something to that effect.

Q That is why you made her the beneficiary of this property under your will, is it not? A It is. Yes, sir.

* * * *

613 Q So you were trying to carry out the wishes of your wife in the instrument which you executed, bequeathing the property at 3218 Klinge Road after your death to Mrs. Newby? A That is right.

Q Now, Mr. McClellan, you testified, I believe, that your wife was a meek, mild woman, in your direct testimony. A She was very meek, and mild, and sensible.

Q And I believe you also testified in your direct testimony that you never used profane language to your wife, or to any lady? A I did.

Q Now, you did not testify on your direct examination, as I recall it, whether or not you use intoxicating liquors, did you? A I can't recall.

* * * *

614 Q Did your wife use intoxicating beverages to excess when you married her on October 19th, 1946? A Absolutely, no.

Q Did she use them at all? A Yes, sir.

Q To what extent did she use them? A Very moderately.

Q Did she ever get to the place she used them
615 to excess? A She certainly did, after she sold the
house.

Q After she sold the house? A Yes, sir.

Q And that is the first time she ever used them to
excess? A Her children drove her to drink.

Q And she didn't use them to excess until after she
sold the house and the children drove her to drink? A
She used them more to excess after she had this trouble
with her children.

Q I will ask you whether or not you gave these answers
to the questions which I am reading, from page 22 of the
transcript of your deposition on March 21, 1951. The
questions were asked by my associate, Mr. Dorsey, sitting
here: (Reads:)

"Q Was it your habit between 1947 and 1951 to bring
home whiskey each evening?

* * * *

616 "A She would call me on the phone and ask me
to bring—to please stop at the Frenchman's and
bring a fifth or a quart every evening. A lot of times we
would go up to get it and found she had already ordered
one that afternoon.

"Q Did you bring it, as a usual occurrence, whiskey,
home every evening?

"A Not every evening.

617 "Q About how often?

"A Well, I like to have a little drink, myself,
probably two or three times a week, and maybe on Satur-
day get a couple of fifths, or something."

* * * *

618 Q I asked if you gave those answers to those
questions. A Yes, I did. We always had a little
whiskey around the house.

* * * *

621 Q Mr. McClellan, did you ever tell anybody anything in reference to Mrs. McClellan's will? A I can't recall ever saying anything about the will.

Q Did you ever mention it to any of the girls working in the house? A I don't recall ever doing that.

Q To any of the nurses who were caring for your wife in her last illness? A No, I don't think I mentioned it. I don't recall doing it. I don't see why I would.

Q Did you ever tell the maids that were working with your wife, or the nurses that were caring for her in her last illness, that you had been to see your lawyer?— A I certainly—

* * * *

622 Q Did you ever tell Louise Gilbert when she was taking care of your wife in her last illness, that you had just returned from your lawyer's office? A No, I can't recall talking to her.

Q Did you tell Louise Gilbert, who was attending your wife in her last illness, that you were to get all of the property under your wife's will? A I certainly did not say any such thing.

Q Did you tell Louis Gilbert, in your wife's last illness, that you were afraid Mrs. Newby would try to get your wife to change her will, the will leaving you everything? A Absolutely, no.

Q Did you tell Louise Gilbert, in your wife's last illness, that you wanted her to be ready to testify that your wife had been drunk during the entire time she was taking care of her? A Absolutely, no.

623 Q Did you ever use any profanity, or call your wife an ugly name in the presence of Louise Gilbert, while she was taking care of your wife in her last illness? A I most certainly did not. She was in a coma the last two months. All I did was to help her.

* * * *

Redirect Examination

* * * *

624 Q Now I show you this paper from your file, which bears the heading "General Accounting Office Division of Personnel" dated October 4, 1945, and ask you to state to the Court and Jury from that memorandum, what was your annual salary as of that date? A It was raised from \$3970 per annum to \$4300 per annum.

* * * *

630 Q So if you had wanted to use your wife's money, the proceeds of this sale, \$1300, to satisfy that judgment, you could have done that in October, 1947, could you not? A I could have. Yes, sir.

* * * *

633 *E. B. Drown*

* * * *

Direct Examination

* * * *

Q Mr. Drown, will you state your full name, please?

A E. B. Drown.

* * * *

Q What is your occupation? A Government clerk.

Q With what Government agency are you affiliated? A General Accounting Office.

Q How long have you been affiliated with that agency?

A Since January, 1943.

Q Do you know Mr. Alfred D. McClellan, the gentleman at the end of the trial table? A I do.

Q How long have you known him, sir? A Since 1943—first part of the year.

Q Have you finished?

* * * *

Q Was there a time after you first met him that
634 you actually lived with Mr. McClellan? A I did.

Q As a fellow roomer? A I did.

Q At what address? A 3409 Wisconsin Avenue, Northwest.

Q How long did you and he live together at that address? A Approximately two years.

Q Was that an apartment house, or a private home?
A An apartment house.

Q Can you fix the date that Mr. McClellan left your quarters as a fellow roomer? A I couldn't say the exact date, sir, but I would say it was around July or August, 1945.

Q July or August, 1945? A Some time along there.

Q In the course of your acquaintance with Mr. McClellan, Mr. Drown, did you ever meet his deceased wife, Mrs. Anne G. McClellan? A I did.

Q When did you first meet her? A I couldn't say the exact date. I would say somewhere in 1944.

Q Will you describe the circumstances under which you met Mrs. McClellan, who was then Mrs. Anne G. Morgan?

A Well, as I recall the first time I met Mrs. Morgan
635 was over at the Macomb Restaurant, and Mr. Hayes and her son and another fellow—I have forgotten his name now—were in there. I used to eat their pretty regularly, and they very frequently ate there.

Q Would you fix that date again, the first time you met Mrs. Morgan? A I couldn't say the exact date. It was some time in 1944, to the best of my knowledge.

Q How often did you see her after that, after her marriage to Mr. McClellan in October, 1946? How often did you see Mr. and Mrs. McClellan? A Oh, I couldn't say for sure, but quite frequently.

Q Did you ever visit the home at 3216 or 3218 Klinge Road? A I have.

Q Can you give us a little more definitely as to how frequently you visited the home? A Oh, possibly once a month, or maybe oftener. I couldn't say exactly.

Q Over what period of time, now, did those visits continue? A Up until 1948.

Q Up until 1948. Can you give us your opinion, Mr. Drown, as to Mrs. McClellan's ability, in the early
636 days of their marriage—that would be in the fall of 1946—to manage her own affairs? A She appeared to me at all times to be very capable.

Q Directing your attention now to the date, November 1st, 1946, what is your opinion as to her capacity to execute a valid deed, contract, or will, as of that date? A Well, to the best of my knowledge she was, as I said, she was very capable. I wouldn't know at that particular date, I can't say that I saw her on that day.

Q Would you say that condition that you have just described continued up to the time you stopped visiting in 1948? A I would, to the best of my knowledge.

* * * *

Cross-Examination

* * * *

637 Q Did you know anything about her habits with respect to alcohol? A I do not.

Q Did you at that time know anything about her habits? A As to alcohol?

Q Yes. A I have seen her take a drink, yes.

* * * *

Q Have you been to her home at any time when she didn't offer you a drink? A I have.

Q Tell us when that was? A I don't remember the date, but I could tell you pretty good. It was on Sunday. I ran into a fellow on the street, and we went down to a delicatessen on Macomb Street, got a steak and took it
638 over to Mr. McClellan—he came over after it. We went over there and we cooked steak—Mrs. McClellan and I.

Q That was the only occasion you can recall, on which you were not invited to have a drink? A I don't recall that. I know we didn't have a drink.

Q Do you know any other day when you didn't have a drink? A I don't say I do. I don't say that I do.

* * * *

Q Was there ever a time you played cards with them that you didn't have drinks? A I don't say there was, or there wasn't.

* * * *

640

Redirect Examination

* * * *

Q Mr. Drown, during the four years that you knew Mrs. McClellan, from 1944 to 1948, did she to your knowledge ever drive an automobile? A Yes, sir.

Q Did you ever drive with her, or ride with her? A I have.

Q On how many occasions? A That I don't recall. Several, though. More than once.

Q Would you say she was a competent driver? A Apparently so.

* * * *

641

Louise Gilbert

* * * *

642

Direct Examination

BY MR. McCANN:

Q Will you please state your name and your address?

A Louise Gilbert; 1706 Euclid, Northwest.

* * * *

Q Will you please state what your business is? A Practical nurse.

Q How long have you been engaged in that business?
A Oh, about two years, I guess.

Q Were you employed as a practical nurse in the home of Mrs. Anne G. McClellan, in 1950? A Yes, I was.

Q For how long a period? A From August, 1950 to November.

* * * *

643 Q That is better. Did she ever demand, while you were there, that you get drinks for her? A Yes.

Q How often? A Well, I started in the morning, about eight o'clock, and after she had a bit of breakfast, which was very light, she wanted a drink, and as soon as she finished one, she wanted another one.

Q Was that continuous throughout the day? A Yes.

Q Did Mr. McClellan ever say anything to you about furnishing drinks to Mrs. McClellan? Did he ever give you any orders on the subject of not giving her drinks?

A One time he told me not to give her so much.

Q One time? A Yes.

Q Did Mr. McClellan ever tell you anything with respect to Mrs. McClellan's will? A Yes.

* * * *

644 Q What did he tell you? A He told me to keep my eyes and ears open, because Mrs. McClellan left everything in her will to him, and he was afraid that she would make a new will, and he wanted me to keep my eyes and ears open to hear anything that Mrs. Newby would say concerning the will, because he was afraid she would make a new will.

* * * *

645 Q I want to return to a question I asked a few moments ago, and ask you, at a later time, after

646 Mr. McClellan, you say, once told you not to give her so much to drink,—at a later time did he tell you to give her liquor to drink? A Yes.

Q What did he tell you then?

* * * *

A * * * One night he came into the room, and she was rather sick at the time, and she wanted a drink. He said "Give her a drink". The doctor had instructed me to cut down on the liquor and not—

BY MR. McCANN:

Q What? A He instructed me not to give her any liquor and as little water as possible.

Q What did Mr. McClellan say to you then? A He said "Oh, give her another drink. All she needs is a drink".

Q Now, when Mr. McClellan told you about the will, where did he tell you he had been that day? A He said he had consulted his lawyer, and his lawyer told him to just sit tight.

Q After he told you this, did he give you any instructions? A Yes. He told me to keep my eyes and ears open, because he was afraid that Mrs. Newby would
647 contest the will, because Mrs. McClellan had left everything in the will to him.

Q Did Mr. McClellan tell you he was afraid of anything? A No, he just said he was afraid that she would try to contest the will.

Q Did you ever hear Mr. McClellan swear at his wife, or call her names? A Yes.

Q Will you tell the jury what you have heard him call her? A I have heard him—I have heard him call her a God-damn drinking bum. I have heard him call her a hag, and also a son-of-a-bitch.

Q Did you say "hag"? A Hag—h-a-g (spells).

Q Did you just hear him call her that once, or did he call her names often? A Yes, he called her those often when he would be drinking. Maybe things wouldn't be going right.

* * * *

648 Q Will you tell me what Mrs. McClellan's attitude toward her husband was? A Yes. During

the latter part of her illness she seemed to be afraid of him, because she would constantly ask me to spend the night with her. After being on duty all day, she wanted me to spend the night with her also.

Q What else? A She would ask me to spend the night, ask me not to leave her. And at night when I was there, she would always tell me to lock the door.

Q She told you to lock the door? A Yes.

* * * *

MR. DAVIS: Were these conversations you are
649 now telling us about, in the presence of Mr. McClellan?

THE WITNESS: Oh, no. Oh, yes, sometimes she would ask me to spend the night, in the presence of Mr. McClellan and Mrs. Newby. Even when she wasn't very sick and it was time for me to be off duty, she would say "Louise, you aren't going to leave me?" I would say I had to go home to see about the baby, and she would start to cry—"Are you going to leave me?" and I would say "No, I am not going to leave you".

BY MR. McCANN:

Q Will you tell me how often Mrs. Newby came in to see her mother while you were there? A Mrs. Newby came in every day except Saturday and Sunday, which she had to spend with her family, and during the time Mrs. McClellan was very ill, she came every day, including Saturdays and Sundays.

Q Was Mrs. McClellan in a coma during the last two months of her life? A Definitely not.

Q Did Mrs. McClellan ever indicate to you how she felt toward Mrs. Newby?

* * * *

650 THE WITNESS: She would always say that the brightest moment of the day was when Mrs. Newby came to see her, and she would look forward to that very much.

* * * *

Cross Examination

* * * *

651 Q Who paid you your salary as a nurse? A
Mr. McClellan.

* * * *

652 Q Were you served with a subpoena in this case
last Wednesday, to appear in this Court? A I
don't remember what date it was. I have it here.

* * * *

Q I direct your attention to this one— A (Interpos-
ing) Yes.

Q (Continuing)—commanding you to appear in this
Court on the 7th day of May, 1951. A Yes.

Q Served by Mr. Irving G. McCann. Did you
653 appear in this Court on May 7th? A No, I did
not, because Mrs. Newby called me and told me that I
wouldn't be needed at that time.

Q You wouldn't be needed? A Right.

Q Did Mr. McCann leave at your home the sum of
\$4.30 as a witness fee and your mileage? A Yes, he did.

Q This second subpoena you were served by the United
States Marshal, were you not? A Yes.

Q Now, after the service of the first subpoena by Mr.
McCann, you talked to Mrs. Newby on the telephone, did
you not? A Yes.

Q And she told you you wouldn't be needed? A That
is right.

Q When did you again talk to Mrs. Newby and find
you would be needed? A Well, I called her several times
and she told me to come at ten o'clock, then she called
again and said I wouldn't be needed, and she would let
me know when I would be needed.

Q You didn't want to testify in this case, did you?

A Yes, I did. I told her from the beginning I would be willing to do anything to help.

654 Q Have you ever talked to Mr. McCann or Mr. Dorsey about your testimony in this action? A Yes, I have.

Q Did you tell them what you were going to testify?

A I told him I would tell—I would tell only the truth. I told him I had nothing to be afraid of. And they also said I had nothing to be afraid of. And I have told nothing but the truth.

* * * *

Q Was there another nurse on duty when you first went on duty? A She just left.

Q She had just left? A Yes.

Q Do you recall her name? A No, I don't recall her name.

Q Would the name Cora Lee Canty refresh your recollection? A I remember Cora, but I don't remember the Canty.

655 Q Do you know how much Mr. McClellan was paying Cora for her nursing services? A I do not.

Q Didn't you learn later he was paying you considerably less, at least twelve dollars a week less than he was paying Cora? A No. I had no knowledge whatsoever of the amount of money he was paying Cora.

Q He was paying you thirty? A That is right.

* * * *

A No, he did advance me, but that wouldn't be lending, because I worked it out.

Q Did you prepare the meals for Mrs. McClellan? A Well, she ate very little. She had this
656 (Baradomine). It was powdered food—it was powdered food—use two tablespoonsful,—sugar flavor and milk, and that is what she had.

Q She was suffering from a broken hip, was she not?
A Yes.

Q Of course you can't put a hip in a cast, so she was in bed during the entire time you were there, was she not? A Yes.

Q I believe you said on direct that after you arrived at the house, you would prepare her a bit of breakfast?
A Yes.

Q And then she would ask for a drink? A Yes.

Q What kind of breakfast did you prepare? A This (Baradomine). That was her food. She had that at breakfast. Sometimes she would have it three times a day. Sometimes she wouldn't want it but once.

Q She wasn't on a solid diet at that time, isn't that true? A That is right.

Q That was under the doctor's orders? A The doctor didn't tell me to keep her on a diet. He said not to make her eat.

* * * *

657 Q Have you ever noticed any other people who were suffering from a broken hip? A No, I haven't.

Q This was your first one? A Yes, with a broken hip.

* * * *

Q You don't know, then, it is the regular practice in cases of a broken hip to keep the patient on a soft or liquid diet? A No, but I followed the doctor's directions, you know, what she was supposed to have, and he visited every Thursday.

Now, you have mentioned one occasion where Mr. McClellan did tell you to stop giving Mrs. McClellan liquor?
A Yes.

Q Can you fix the month that occurred? A No, I really can't.

Q You can't tell us whether it was August, Septem-

ber, October, or November? A No, I don't know
 658 exactly what month it was, but I do think it was
 during the first month while I was working there.

* * * *

Q When he first engaged you, what hours was your
 day to encompass? A He said get there around quarter
 of eight, eight, and he usually got home around five, five-
 fifteen.

Q Your usual quitting time was around five or five-
 fifteen? A Yes.

Q Who took over the nursing after you left? A Well,
 he was there.

* * * *

659 Q Did you ever see Mrs. Newby come in and act
 as a nurse for her mother A When she was real
 sick.

Q When was that? A During the month she was
 sick, the last month she was really sick.

Q What month, September, October, or November?
 A During November.

Q Mrs. Newby stayed at night? A Not all night.
 She stayed most of the night.

Q What time did she leave on those occasions? A I
 don't know. Around ten or eleven. I don't know what
 time, but it was late.

Q Was anyone with her on her visits? A Her hus-
 band brought her over there, and her brother was there.

Q Her brother? A Yes.

Q What is his first name? A Mr. Marshall.

Q That is Mr. Marshall Morgan? A Yes.

Q How often did you see Mr. Marshall Morgan
 660 visit his mother when you were there? A Well,
 he didn't come too frequently, but she was there
 practically every day.

Q How many times during the four months you were
 there would you say Marshall was there? A Oh, I will
 say about five times.

Q Five times? A Yes.

Q That was during the day hours, was it? A Yes, and he would come at night when she was really sick.

Q Just prior to her death? A Yes.

Q Did you ever see Mrs. McClellan write any checks during the daytime?

* * * *

A She couldn't see very well, and wasn't in any condition to write checks. If it was early in the morning she could write it, but later in the day she couldn't write it too well, and Mrs. Newby had to write them for her.

Q Who wrote them? A Mrs. Newby.

661 Q Mrs. Newby? A Yes.

Q I will show you Defendant's Exhibit 5, dated October 7, 1950. A Yes.

Q And Defendant's Exhibit 6, dated October 16, 1950. You recognize in whose handwriting the payee, the amount and date of those checks are? A Yes.

Q Whose handwriting is that? A That is Mrs. Newby's.

Q Mrs. Newby's? A Yes.

Q I show you Defendant's Exhibit No. 19— A Yes.

Q Dated October 24, 1950— A Yes.

Q And ask you to compare that with the previous two exhibits, 5 and 6. Whose handwriting is No. 19 in? A That is mine.

Q That is yours? A Definitely. That is Mrs. McClellan's, I think, but I am not sure. I don't know. I am not too familiar with it.

Q You have already said these two were in Mrs. Newby's handwriting. A Yes.

Q And you are positive No. 19A is your handwriting? A Yes, that is definitely mine.

Q I show you 19-B, dated October 10, 1950. Whose handwriting is 19-B in? A That is Mrs. Newby's.

Q That is Mrs. Newby's? A Yes .I can't be too sure about that, but I think that is Mrs. Newby's.

Q You had better be sure before I look at the back.
A I think that is Mrs. Newby. I am not too familiar with her handwriting.

Q 19-B is Mrs. Newby? A Yes.

* * * *

663 Q Now I show you this one, 19-B—well, you have already testified to that. I show you this one, on a different form of check. A Oh, that is my handwriting, definitely.

Q Made out to the Macomb Wine and Liquor Store. That is your handwriting? A Yes.

Q 19-B was the only one you were positive about, was in Mrs. Newby's. That is made payable to the Macomb Liquor Store. A Yes.

Q Now, was there ever any occasion when you were employed there that Mr. McClellan when he came
664 home in the evening would find a bottle of whiskey under his wife's pillow? A Yes.

Q How many times did that happen? A That happened as often as she asked me to bring her a small bottle, because she was unable to sleep at night, and she said she wanted a bottle so she could go to sleep. The doctor told me—that was while she was really sick—not to take her completely off liquor, because the shock would be too much for her, it would kill her.

Q The doctor told you that? A He definitely did. Dr. (Owens). I remember her name. And if she wanted me to fix her a small bottle of liquor so she could rest at night, naturally I prepared it for her. After all, I wanted her to be happy, regardless.

Q Let me see if I understand you right on this point: I believe you testified Mr. McClellan told you to keep your eyes and ears open to hear anything that Mrs. Newby would say, because he was afraid she would contest the will? A Yes.

* * * *

666

A. M. Goldstein

* * * *

Direct Examination

BY MR. DAVIS:

Q Mr. Goldstein, will you please state your full name to His Honor and the members of the Jury? A My name is A. M. Goldstein.

* * * *

Q How long have you been a member of the District of Columbia Bar, Mr. Goldstein? A For over
667 twenty years, sir.

Q Directing your attention to Municipal Court No. A-18495. were you the counsel for the plaintiff in that action, titled Betts versus McClellan? A Yes, sir.

* * * *

Q Did you ever know Mr. McClellan prior to that action? A Never, sir.

Q Was there a final judgment in that action? A
* * * Yes, sir. There was a jury trial, and the jury awarded a judgment of \$1070.00.

* * * *

668 Q Has that judgment since been satisfied by Mr. McClellan? A Yes, sir. It was satisfied.

Q Will you state to His Honor and the members of the jury how the judgment was paid, whether in one lump sum, or in installments? A You want me to answer your first question, when it was satisfied?

Q Yes. A I entered a praecipe showing that the matter had been fully settled and satisfied and dismissed on the 22nd of December, 1947.

* * * *

Q (Continuing) Was that paid in installments, or in one lump sum? A That was paid in installments.

* * * *

669 Q Payments were made every month until it was paid \$25.00 a month? A Yes, sir.

Q Directing your attention, Mr. Goldstein, specifically to the date October 19th, 1946, can you tell us approximately how much had been paid on that judgment up to that time?

* * * *

670 A Three hundred and thirty plus fifty-eight, ninety; that would be three hundred and eighty-eight, ninety (\$388.90) from October 7, 1946 up to and including December 16, 1947.

Q In other words, there was that much still due and unpaid as of that date? A From 10-7-46.

Q In other words, the judgment had been paid over fifty per cent off on October 18, 1946? A Oh, yes. Oh, yes.

Q Now, I will ask you to refer to another date in your records, Mr. Goldstein, referring to the month of October, 1947. A October, 1947—that would be the tenth month, wouldn't it?

Q Tenth month, yes. How much was due and unpaid on the judgment at that time, a year later? A From October 17th, 1947 until it was paid, there was due fifty-five plus fifty-eight, ninety. Add that up.

Q A little over a hundred dollars? A \$113.90 due, including interest and costs.

* * * *

671

Alfred D. McClellan

* * * *

Direct Examination

BY MR. DAVIS:

Q Mr. McClellan, you have heard the testimony of Louise Gilbert this morning? A I did.

Q You heard her testify that at some point during the time she was at your residence, in her presence you called your wife a God-damn drinking bum. Did you or did you not ever use such language? A I certainly did not.

Q You heard her refer to an occasion when she says you called your wife an old hag in her presence. Did you or did you not use that language? A I certainly did not.

Q I may be in error on this, but I think there was a third designation in which you used some form of profanity, in which she says you called your wife a son-of-a-bitch. Do you or did you ever use such language? A I never used any such language. All I tried to do was to take care of her to the best of my ability.

Q You have heard her testify that some time during the four months period she was there, on one occasion you told her you had just come back from a lawyer's office. Did you or did you not ever tell Louise Gilbert that? A I did not tell her that. Mr. Malloy's testimony proves it.

* * * *

673

*Motion for Directed Verdict in Behalf of
Caveatee:*

MR. DAVIS: I move at this time, if the Court please, for a directed verdict in favor of the Caveatee on all issues in the Caveator's petition. * * *

* * * *

686 THE COURT: Well, gentlemen, I do not think
I will direct a verdict on any of the issues except
that of the execution of the instrument and the formalities required by law. As the others, I think I shall leave them to the jury. Have you any requests for instructions.

* * * *

689 Caveator's Request for Instruction No. 1 was amended as follows, and was granted as amended:

The jury is instructed that in determining the issue of testamentary capacity they may consider the age of the deceased, the physical health of the deceased, the habits of the deceased in general and in respect to the use of alcohol, and the extent, if any, to which these factors destroyed or greatly impaired the testamentary capacity of Anne G. McClellan, as well as all other evidence bearing on the question of testamentary capacity.

* * * *

690 Caveator's Request for Instruction No. 3 was amended to read as follows, and was granted as amended:

The jury is instructed that the weight to be given to the testimony of the witnesses to the will of Anne G. McClellan depends upon the extent of their opportunity to observe Anne G. McClellan at the time of the execution of the will and their use of this opportunity to ascertain whether or not she had sufficient testamentary capacity to execute a will or was the victim of fraud or undue influence.

* * * *

Caveator's requested Instruction No. 5 was amended and was granted as amended, as follows:

Caveator's Requested Instruction No. 5
(as amended)

Fraud consists in and includes cases of the intentional and successful employment of any deceit, trickery, mis-

representation, artifice or pretension used to circumvent, cheat, or deceive another; and which induces a person to dispose of his or her property, or to do some act contrary to her wishes, or in such a way as she would not, but for such fraud.

* * * *

693

Court's Instruction A

(In lieu of Caveator's Instruction No. 6.)

Fraud, as any other fact which is in issue, may be established by circumstantial evidence, as well as by direct evidence. Circumstantial evidence is the proof of facts from which a reasonable inference of the ultimate fact in issue may be inferred.

* * * *

Caveator's requested Instruction No. 7 was amended, as follows, and was granted as amended.

Caveator's Request for Instruction No. 7

(As amended)

The jury is instructed that they may find there was undue influence in the procurement of the will of Anne G. McClellan if they find from all the evidence that
694 she was induced to make a will which did not really express her intentions regarding the disposition of her property by the influence of her husband, which overcame her own intentions and was not therefore her own free act.

* * * *

Caveator's Request for Instruction No. 8

(Substitute)

The jury is instructed that, in determining the question of undue influence, such undue influence can be established by a reasonable inference arising from facts

and circumstances disclosed by the evidence of the
 695 conditions and surroundings of the parties, and
 that, in determining whether deceased was unduly
 influenced by caveatee Alfred D. McClellan, the Jury may
 consider evidence of Mrs. McClellan's age, mental condi-
 tion, physical condition, the relationship of the deceased
 to the person charged with unduly influencing her, and
 the reasonable inferences to be deduced therefrom, es-
 pecially with regard to her ability to resist undue influ-
 ences exercised upon her, if any were so exercised.

* * * *

696 Caveator's original requested Instruction No. 11
 was withdrawn, and the following instruction sub-
 stituted therefor, and granted:

Caveator's Request for Instruction No. 11

(Substitute)

The jury is instructed that in determining the issue of
 fraud and undue influence they may consider the fact
 that the will of Anne G. McClellan gave 3216 Klinge
 Road to her daughter, and that subsequently this prop-
 erty was sold by testatrix, and the will gave Marshall
 Morgan, her son, the sum of \$500; and that this will also
 gave 3218 Klinge Road to Alfred D. McClellan abso-
 lutely as his own property and enables him to do with
 that property whatever he desires; and the fact that
 the will of Alfred D. McClellan, executed at the
 697 same time as the will of Anne G. McClellan, which
 would leave 3218 Klinge Road to Mrs. Newby was
 then, is now, and will be until his death, revocable by
 him at any time.

* * * *

Defendant's (Caveatee's) Prayer No. 2

The Court instructs the jury that sanity and mental
 capacity are presumed in law, and this presumption ex-

ists as well in last wills and testaments as to other matters. The burden of proof rests, as a consequence, upon those who allege the contrary.

Furthermore, where the due execution of a will is proved, it will be presumed that the testatrix was of sane mind at the time of execution, in the absence of evidence to the contrary.

These presumptions of the law in favor of testamentary capacity and the right of testamentary disposition of property, which includes the right of revocation, ought not to be imperiled by inconclusive or uncertain testimony.

Defendant's (Caveatee's) Prayer No. 2 was amended by the deletion of the last paragraph which reads as follows, and was granted as amended:

"These presumptions of the law in favor of testamentary capacity and the right of testamentary disposition of property, which includes the right of revocation, ought not to be imperiled by inconclusive or uncertain testimony."

Defendant's (Caveatee's) Prayer No. 3

The Court instructs the jury that the question of the mental capacity of an aged or feeble person to dispose of her property by will, deed or otherwise, is not whether or not the powers of her mind were impaired, or whether or not she had ordinary capacity to do business, but it is whether or not she had any capacity to understand what she was doing, and to determine intelligently whether or not she would do it. Any other test would wrest from the feeble and the aged that power over their earnings and savings which is their best safeguard against misfortune, and would produce endless uncertainty, difficulty and litigation.

Old age, eccentricity, partial impairment of mental faculties, delusion or lapses of memory not affecting the immediate transaction, are not sufficient basis for setting aside a will or conveyance, if the grantor possesses sufficient mental capacity to comprehend the nature of the transaction.

Defendant's (Caveatee's) Prayer No. 3 was denied and Court's Instruction B substituted in lieu thereof. The same action was taken with respect to Defendant's (Caveatee's) Prayer No. 4, which follows:

Defendant's (Caveatee's) Prayer No. 4

The Court instructs the jury, that to make a valid will it is not necessary that the testatrix should be endowed with a high order of intellect, or even an intellect measuring up to the ordinary standards of mankind. Nor is it necessary to the making of a valid will that the party should have a perfect memory, and that her mind should be wholly unimpaired by age, sickness or other infirmities. If the party possesses memory and mind enough to know what property she owns and desires to dispose of, and the person or persons to whom she intends to give it, and the manner in which she wishes it applied by such person, and, generally, fully understands her purposes and the business she is engaged in, in so disposing of her property, she is, in contemplation of law, of sound and disposing mind.

Court's Instruction B, substituted in lieu of Defendant's (Caveatee's) Prayers Nos. 3 and 4, reads as follows:

Court's Instruction B

(In lieu of Defendant's Prayers 3 and 4)

The jury are instructed that neither age, nor sickness, nor eccentricities, nor peculiarities will affect the capacity of a person to make a valid will, if such person retains sufficient mind and memory to know:

1. What property she owns in a general way;
2. The person or persons who would be the natural objects of her bounty and her relations towards them;
3. The business in which she was engaged when executing her will and the contents thereof;
4. How she wishes to dispose of her property, and that the will carries out her wishes.

If you believe from the evidence that Anne G. McClellan possessed sufficient mentality to meet these requirements on November 1, 1946, your verdict should be in favor of the defendant under the third issue.

Defendant's (Caveatee's) Prayer No. 5 was granted, as follows:

Defendant's (Caveatee's) Prayer No. 5

The Court instructs the jury that "undue influence" involves "improper means and practices". Influence gained by kindness and affection will not be regarded as "undue", if no imposition of fraud be practiced, even though it induce the testatrix to make an unequal disposition of her property in favor of those who have contributed to her comfort, if such disposition is voluntarily made. Confidential relations existing between the testatrix and beneficiary do not alone furnish any presumption of undue influence.

One has the right to influence another to make a will in his favor. He may lay his claims for preferment

before the testatrix. They may be based on kinship or friendship or kindness or service or need or any other sentimental or material consideration. One can use argument and persuasion so long as it is fair and honest and does not go to an oppressive degree where it becomes coercive.

Moreover, "possibility" or "suspicion" of undue influence is not enough.

* * * *

704 Defendant's (Caveatee's) Prayer No. 8, reading as follows, was denied:

Defendant's (Caveatee's) Prayer No. 8

705 The Court instructs the jury that in cases of this type, i. e.—will contests, the law makes a distinction between subscribing and non-subscribing witnesses to the will in question.

The testimony of these two different classes of witnesses on the subject of mental capacity is not precisely on the same footing as to value. The attesting witnesses are considered in the law as placed around the testatrix to protect her against fraud in the execution of her will and to judge of her capacity, and it is their duty to inform themselves of her capacity before they attest her will, and therefore these witnesses are permitted to testify as to the opinion they formed of the testatrix's capacity at the very time she was executing her will. The mere naked opinion of other persons not occupying the positions of medical men are inadmissible in reference to the mental capacity of the testatrix whose will may be controverted. Some such witnesses may have such knowledge as may make their opinions of testamentary capacity admissible, but such witnesses lack the opportunity given to the subscribing witnesses to form an opinion of the testatrix's capacity at the moment when she executed her will.

* * * *

707 Defendant's (Caveatee's) Prayer No. 10, reading as follows, was denied:

Defendant's (Caveatee's) Prayer No. 10 (Denied)

The Court instructs the jury that when and if you should find that it was within the power of a party to this litigation to have produced stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust the weaker and less satisfactory evidence actually offered on that point. (Standard, No. 12)

You are therefore instructed, as a matter of law, that if you find that the plaintiff in this case, Mrs. Newby, has failed to call and examine as a witness any person who has knowledge of material matters at issue in this case, the fact that the plaintiff, Mrs. Newby, has so failed to call and examine such witness creates the presumption that the testimony, if produced, would be unfavorable to plaintiff's case.

* * * *

720 MR. McCANN: Now, reflection is cast on Mr. Newby here—an FBI agent—that he did all this investigating. Mr. Dorsey was raised in the back yard of the Newby family. He's a young lawyer. Mr. Davis has said a lot of things that weren't in the record, so I will tell you, Mr. Dorsey was raised with the Newby children. Mr. Dorsey is the counsel they selected in this case. Mr. Dorsey investigated this case. Mr. Dorsey looked up the will—I mean the divorce action. Mr. Dorsey got a lot of these facts from these divorce papers here. Mr. Dorsey asked questions of him as to where he had lived, and who got the divorce. Mr. Dorsey is the one who did the job of investigating this case. And I will say to you ladies and gentlemen, without hesitation, that I took these papers and the FBI hasn't

seen these papers between the time I took them and brought them back to the Court. I was concerned—there was so much fraud evidenced in this case that I wanted to see if these papers had been made five years ago. I was concerned because of the fact that Mr. Malloy had sat in this hearing and allowed his client to testify that his wife had gotten the divorce, when Mr. Malloy was his lawyer, and got the divorce for him. Mr. Malloy was not guilty of any irregularity on these. I took them out to a specialist, and not the F.B.I., and the specialist said to me “My investigation shows these papers as having been written at least two years ago.”

721 MR. DAVIS: I must object to all of this argument. That is not based on the evidence. I raise the point now that Mr. McCann is testifying.

THE COURT: Wait a minute. Both of you have gone outside the record on it for just a little bit. You said he had gone over to the F.B.I., and he says he hasn't, and he says it doesn't prove any fraud, and so, while he goes out of the record in saying that, it is a concession, if anything—it is not a claim with respect to it.

* * * *

732 The jury is instructed that the weight to be given to the testimony of the witnesses to the will of Anne G. McClellan depends upon the extent of their ability to observe Anne G. McClellan at the time of the execution of the will and their use of this opportunity to ascertain whether or not she had sufficient testamentary capacity to execute a will or was the victim of fraud or undue influence.

* * * *

735 You may consider the opportunity or lack of opportunity, of a witness to have observed and to know the matters concerning which such witness has testified. You may consider the capacity and ability of a witness in the circumstances to have accurately ob-

served and therefore to know the matters concerning which such witness has testified. You may consider the capacity and opportunity of a witness to have accurately recollected and related what the witness did observe.

* * * *

Defts. Exhibit 2

*Last Will and Testament of
Alfred D. McClellan*

I, Alfred D. McClellan, of Washington, D. C., do make, publish and declare this to be my last will and testament, hereby revoking all wills and codicils by me at any time heretofore made.

Item 1. I give and bequeath unto my son, William A. McClellan, of Washington, D. C., the sum of Five Hundred Dollars (\$500.00).

Item 2. I give, devise and bequeath unto Virginia M. Newby, my stepdaughter, premises 3218 Klinge Road, N. W., Washington, D. C., in the event title to said premises are in my name at the time of my death.

Item 3. I give, devise and bequeath all of the rest, residue and remainder of my property and estate of any character whatsoever, absolutely and in fee simple, unto my wife, Anne G. McClellan.

Item 4. I hereby nominate, constitute and appoint Anne G. McClellan, my wife, executrix of this my last will and testament, with full power of sale of real estate and request she be not required to furnish bond in her capacity as executrix.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal at Washington, D. C., this the 1st day of November, 1946.

/s/ Alfred D. McClellan (SEAL)

The foregoing instrument, at the time and place thereof, subscribed, sealed, published and declared by Alfred D. McClellan as and for his Last Will and Testament,

in our presence, and in the presence of one another, here-
unto subscribe our names as attesting witnesses thereto,
the day and year last above written.

/s/ Louis Horowitz address 416 - 5th St. N. W.,
Washington, D. C.

/s/ Thomas M. Baker address 416 - 5th St. N. W.,
Washington, D. C.

Pre-Trial Exhibit /s/ Curran Justice

Deft. Exhibit 4

In the event of my death, it is my earnest desire and
wish that my mother, Anne G. Morgan have the entire
supervision and complete charge of my two children,
Anne Gresham Newby, and Loretta Reynolds Newby.

/s/ Virginia M. Newby

Deft. Exhibit 10a

Washington, D. C. 10/4 1950 No. 200

LIBERTY NATIONAL BANK

of Washington

15-94-511

Pay to the order of Cash.....\$5.00

Five and 00/100.....Dollars

Anne G. McClellan

Endorsements

M. M. Morgan, Jr.

For Deposit Only

To the Credit of

Peoples Drug Stores, Inc. #141

2332 Wisconsin Avenue, N. W.

Washington, D. C.

308 A

Deft. Exhibit 10b

Washington, D. C. Oct. 9, 1950 No.

LIBERTY NATIONAL BANK
of Washington

15-94-511

Pay to the order of Cash\$35.00

Thirty Five and 00/100.....Dollars

Anne G. McClellan

Endorsements

M. M. Morgan, Jr.
1416 - 20th St., N. W.

Macomb Liquor Store
3703 Macomb St., N. W.

Pay to the Order of
The National Bank of Washington, D. C.
P. Ballantine's Sons

Deft. Exhibit 10c

Washington, D. C. Nov. 13, 1950 No.

LIBERTY NATIONAL BANK
of Washington

15-94-511

Pay to the order of Higgers Drug Inc.\$5.00

Five Dollars No/100 Dollars

Anne G. McClellan

3218 Klinge Rd.

Endorsement

For Deposit to the Credit of
Higger's Drugs, Inc.

Defts. Exhibit 12

C. NEWTON JEFFRESS

Real Estate

Sales - Mortgage Loans - Property Management

Appraisals

2603 P St., N. W.

De 0712

Washington, D. C. March 22, 1948

RECEIVED FROM Duncan C. Lee a deposit of One Thousand Dollars (Check) to be applied as part payment in the purchase of Lot 27 in Square 2101, with improvements thereon known as 3216 Klinge Road N. W. in the District of Columbia upon the following terms of sale:

(1) Price Twenty One Thousand Five Hundred Dollars (\$21,500).

(2) Purchaser agrees to pay Nine Thousand Five Hundred Dollars (\$9,500) cash at the date of conveyance, of which sum this deposit shall be a part.

(3) The Seller Take back a first deed of trust deferred purchase money secured on the premises of Twelve Thousand Dollars (\$12,000) due 19..... bearing interest at the rate of 4 per cent per annum, payable \$88.77 per month

(4) For the balance of deferred purchase money amounting to Dollars (\$.....) purchaser is to execute and deliver a second deed of trust secured on said premises, to be paid in monthly installments of Dollars (\$.....), or more, including interest at the rate of..... per cent per annum, each installment when so paid to be applied, first on the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal.

The purchaser reserves the right to pay all or any part of above Trust, with interest to date—without any premium or penalty whatsoever; Purchaser also has right to pay cash for property—

Trustees in all deeds of trust are to be named by the parties secured thereby.

(5) The property is sold free of encumbrance except as aforesaid; title is to be good of record, subject, however, to covenants, conditions and restrictions of record, if any, otherwise, the deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be remedied by legal action, but the seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken promptly by and at the seller's expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such action.

(6) Seller agrees to execute and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed.

(7) Property is sold and shall be conveyed subject to an existing tenancy as follows: Leased as residence, such lease expiring July 31, 1948.

Seller agrees to give possession at time of settlement. If seller shall fail so to do and occupies said property, seller shall become and be thereafter a tenant at sufferance of the purchaser, and hereby expressly waives all notice to quit provided by law.

(8) Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered to purchaser or is recorded for him by the Title Company making the settlement.

(9) All notices of violations of Municipal orders or requirements noted or issued by any Department of the District of Columbia, or actions in any court on account thereof, against or affecting the property at the date of settlement of this contract, shall be complied with by the seller, and the property conveyed free thereof.

(10) Settlement is to be made at the office of the Agent or at the Title Company searching the title, and deposit with the Agent or the Title Company of the cash payment as aforesaid, the deed of conveyance and such other papers as are required by the terms of this contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof.

(11) Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes as issued by the Collector of Taxes of the District of Columbia, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

(12) Examination of title, tax certificate, conveyancing, notary fees, State revenue stamps, if any, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned Agent to order the examination of title; provided, however, that if upon examination the title should be found defective, and is not remedied as aforesaid, the seller hereby agrees to pay the cost of the examination of the title and also to pay the Agent herein the commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

(13) Within 30 days from the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured if promptly ordered, and/or survey, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof.

If the purchaser shall fail to make full settlement, the deposit herein provided for may be forfeited at the option

of the seller, in which event the purchaser shall be relieved from further liability hereunder, or, without forfeiting the deposit, the seller may avail himself of any legal or equitable rights and remedies which he may have under this contract.

(14) The entire deposit shall be held by C. NEWTON JEFFRESS, Agent, until settlement hereunder is made or until the deposit is forfeited. In the event of the forfeiture of the deposit, the Agent shall retain one-half thereof as a compensation for his services and shall pay to the seller the remaining one-half of the forfeited deposit.

(15) If the property involved in this contract is located in a jurisdiction other than the District of Columbia, wherever any reference is made to the District of Columbia or any official thereof, the name of the jurisdiction in which property is located and the proper official thereof is substituted automatically. If the property is serviced by the Washington Suburban Sanitary Commission, annual benefit charges of said Commission are to be adjusted to date of transfer and assumed thereafter by purchaser.

(16) The seller agrees to pay to C. NEWTON JEFFRESS, Agent, the regular rate of commission 5%, the amount of which said commission being hereby assigned to the Agent by the Seller out of the proceeds of sale. The party through whom settlement hereunder is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to said Agent.

(17) The principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns: that the provisions hereof shall survive the execution and delivery of the deed aforesaid and shall not be merged therein; that this contract contains the final and entire agreement between the parties hereto, and

that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained. Executed in

The stove, refrigerator, screens, awnings, storm windows now belonging to seller are a part of the property. Also window seats are included.

C. NEWTON JEFFRIES, Agent

By Edward Huss Jones

We, the undersigned, hereby, ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

Duncan C. Lee (Purchaser)

..... (Purchaser)

March 22, 1948

Anne G. McClellan (Seller)

..... (Wife of Seller)

March 24, 1948

Property is to be conveyed in the name of Duncan C. Lee and Ishbel Scott Lee tenants by entirety. C N J
Official Standard Form—Washington Real Estate Board

Defts. Exhibit 16

Form 2806-1

December 1939

IMPORTANT:—Read instructions and regulations on back of duplicate before filling in this form.

(DUPLICATE)

Designation, Change, or Revocation of Beneficiary

To the United States Civil Service Commission,
Washington, D. C.

I, *McClellan, Alfred, Duncombe*, born on *July 18, 1887* an annuitant, or employed as *clerk* in *General Accounting Office, Washington, D. C.*, revoking any and all previous designations of beneficiary heretofore made by me, do now designate the beneficiary or beneficiaries named below, to whom I authorize and direct the United States Civil Service Commission of Washington, D. C., to pay

at my death any money standing to my credit in the Retirement and Disability Fund:

Give Complete Name and Address of Each Beneficiary

Anne Gresham McClellan

Relationship *wife*

State share to be paid to each beneficiary—*all*

I hereby direct, unless otherwise indicated above, that, if more than one beneficiary is named, the share of any deceased beneficiary or beneficiaries who may predecease me shall be distributed equally among the surviving beneficiaries, or entirely to the survivor. If none survive me, then to my estate.

I hereby specifically reserve the right to remove or change any beneficiary at any time in the manner and form prescribed by the Civil Service Commission, and without the knowledge or consent of the beneficiary. In the event I withdraw the amount to my credit in the Retirement and Disability Fund, this designation of beneficiary shall immediately become null and void for any possible benefits from any future service or otherwise.

(If retired, state Claim No.)

/s/ Alfred D. McClellan

3218 Klingle Road N. W.

Washington 25, D. C.

If designator cannot write and he signs by mark, the person assisting him should also sign here and give his address.

WITNESSES

We, the undersigned, having no financial interest in this subject matter, directly or indirectly, hereby certify that we are personally acquainted with the person subscribing thereto, and that this instrument was subscribed in our presence and in the presence of each other on the 4th day of November, 1946, and declared to be his (or her) free act and deed.

/s/ Edwin E. Enyart, Laurel Maryland

/s/ Joseph M. Theines 1009½ King St., Alex, Va.

315 A

(Print or type named and address below to insure return of this copy)

Alfred D. McClellan

3218 Klinge Road N. W.

Washington 25, D. C.

Reserved for Receiving Stamp of Civil Service Commission

Received Nov 5 1946 U. S. C. S. C. M. & F. Sec.

Pre-Trial Exhibit /s/ Curran Justice

Defts. Exhibit 19a

Washington, D. C. Oct. 24, 1950 No.

LIBERTY NATIONAL BANK

of Washington

15-94-511

Pay to the Order of Cash.....\$10.00

Ten Dollars no/100 Dollars

Anne G. McClellan

Endorsements

Macomb Liquor Store

3703 Macomb St., N. W.

Pay to the Order of

The National Bank of Washington, D. C.

P. Ballantine & Sons

316 A

Deft. Exhibit 19-B

Washington, D. C. Oct. 10, 1950 No.....

LIBERTY NATIONAL BANK

of Washington

15-94-511

Pay to the order of Cash.....\$5.00

Five and no/100 Dollars

Anne G. McClellan

Endorsements

Macomb Liquor Store
3703 Macomb St. N. W.

Deft. Exhibit 19-C

Oct. 5, 1950 No.....

LIBERTY NATIONAL BANK

Washington, D. C.

Pay to the order of Macomb Liquor Store.....\$2.99

Two Dollars.....99/100 Dollars

Anne G. McClellan

Endorsements

Macomb Liquor Store
3703 Macomb St. N. W.

317 A

Deft. Exhibit 19-D

Washington, D. C. Sept. 26 1950 No.

LIBERTY NATIONAL BANK
of Washington

15-94-511

Pay to the order of Cash.....\$12.00

Twelve and.....no/100 Dollars

Anne G. McClellan

Endorsements

Macomb Liquor Store
3703 Macomb St. N. W.
For Deposit Only
Premium Distributors, Inc.

Deft. Exhibit 22

A. D. McCLELLAN
ANNE G. McCLELLAN
3218 Kingle Road, N. W.
No. 997

15-94-511

Washington, D. C.....19.....

Pay to the order of.....\$.....

..... Dollars

LIBERTY NATIONAL BANK

Washington, D. C.

No. 11,222

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALFRED D. McCLELLAN, Executor of Estate of Anne G.
McClellan, Deceased, *Appellant*,

v.

VIRGINIA M. NEWBY, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

EARL H. DAVIS, Esq.,
900 F Street, N. W.
Washington 4, D. C.
and

JOSEPH D. MALLOY, Esq.,
725 - 15th Street, N. W.
Washington, D. C.

Attorneys for Appellant.

STATEMENT OF QUESTIONS PRESENTED

Although there are eight specific allegations of error set forth in the Statement of Points on Appeal, in this case, (Appellant's Brief, P. 9), on all of which the Appellant relies, there are two fundamental questions presented, the answers to which may be dispositive of this appeal, as follows:

FIRST.—In a will contest, where the principal issue is the alleged lack of testamentary capacity on the part of the testatrix, is it proper for the trial court to permit the caveator to delve into matters involving the testatrix, marital and domestic, which occurred twenty to thirty years prior to the execution of the will in question? Or should such testimony be confined to a period reasonably before and immediately following the execution of a contested will?

SECOND.—In a will contest, where the principal issue is the alleged lack of testamentary capacity on the part of the testatrix, and since medical evidence of physicians who attended a testatrix during her lifetime and especially in her last illness is inadmissible under the decisions of this Court on the ground of privilege, is it proper for a trial court to admit evidence in the nature of a dissertation on the injurious effects of alcohol on the brain, from a psychiatrist who never heard of, saw, or treated the testatrix during her lifetime, said psychiatrist merely testifying in answer to hypothetical questions based only upon partial evidence submitted by the caveator?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,222

ALFRED D. McCLELLAN, Executor of Estate of Anne G.
McClellan, Deceased, *Appellant*,

v.

VIRGINIA M. NEWBY, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Alfred D. McClellan, the nominated executor of the Estate of Anne G. McClellan, his deceased wife, from an adverse verdict of a jury and judgment thereon, in the United States District Court for the District of Columbia, voiding the will of said decedent dated November 1, 1946, on the alleged grounds of lack of testamentary capacity by said testatrix, and

the alleged fraud or deceit, and undue influence or duress or coercion allegedly exercised upon her by her husband, appellant herein; and the refusal of the trial Court to thereafter award judgment notwithstanding the said verdict, or to grant a new trial thereon; and in the reception of objectionable evidence and the exclusion of admissible evidence in the said trial; and in the denial of certain requested prayers for instructions to the said jury, and the granting of certain objectionable instructions to the said jury.

The United States District Court had jurisdiction of the original action under and by virtue of Title 11, Section 306, D. C. Code, 1940 Edition, as amended.

This Court has jurisdiction to review the judgment denying probate of the will in question, under and by virtue of revised Title 28, Sections 1291 and 1292 of the United States Code.

The pleadings showing evidence of the jurisdiction are the Petition for Probate, Petition for Caveat, and Answer thereto, with the Order Framing Issues. (App. 4, 6, 9, and 12.)

STATEMENT OF THE CASE

Mrs. Anne G. Morgan, a divorced woman, had been the owner of two parcels of improved real estate in the District of Columbia, at Nos. 3216 and 3218 Klinge Road, Northwest. She had sold No. 3216 Klinge Road, N. W. during her lifetime (in April, 1948), which was over two and a half years prior to her death on November 21, 1950. The remaining property, No. 3218 Klinge Road, N. W., was her home at the time of her death, and is the principal asset of her estate.

She had married Marshall M. Morgan, Sr., in Nashville, Tennessee, in 1903 (App. 45A). Mr. Morgan had

been in the newspaper business, was at one time an editor of a Nashville, Tenn. newspaper, and had originally come to the District of Columbia as a secretary to former Senator Luke Lea of Tennessee. Mrs. Morgan herself was an educated woman, having attended a college in the South (App. 256A). Mr. Morgan later became a lawyer, in Federal Government service, and still is in Federal service as a lawyer. There were two children born of this marriage, namely, Virginia Morgan Newby (caveatrix here), and Marshall M. Morgan, Jr.

Mr. Morgan divorced Mrs. Morgan in Nashville, Tenn., in 1934, while the family were residents of the District of Columbia. Thereafter they lived separate and apart, Mrs. Morgan remaining in the family home at 3216 Klinge Road, N. W., to which the Morgans had moved in 1923. In that same year, i.e. 1923, Virginia Morgan (caveatrix here) married Robert E. Newby, and the Newbys then moved in with the Morgans at 3216 Klinge Road, N. W. At that time, the son, Marshall M. Morgan, Jr., was on his own, and did not live at the family home. The Newbys remained at 3216 Klinge Road, N. W. even after the Morgans were divorced in 1934, and continued to so remain, raising their own children there, until about 1941, when they moved to Chevy Chase, Maryland. During all of their living in the home of Mrs. Morgan, the Newbys paid her no rent whatsoever.

Mrs. Morgan had obtained title to 3218 Klinge Road, N. W., from a brother-in-law in 1932. This property was a smaller property than was 3216 Klinge Road, N. W.

After the Newbys (testatrix' daughter, son-in-law and family) moved to Chevy Chase, Md. in 1941, Mrs. Morgan rented the larger house, i.e.—3216 Klinge Road, N. W., as a single family dwelling, and moved into 3218 Klinge Road, N. W. which she occupied alone with the exception of several roomers. From then on she handled all her

own financial affairs, such as securing the rental ceiling on 3216 Klinge Road, N. W., under the local Rent Control Act; fixing and collecting the rents, not only from the tenant in 3216 Klinge Road, N. W. but also from the several roomers at 3218 Klinge Road, N. W. She maintained her D. C. Operator's Permit in good standing, and drove her own motor vehicle almost daily. She was an excellent poker player, and several times a week played poker with friends at her home, she winning on most occasions.

In the Spring of 1945 she met Alfred D. McClellan, an employee of the General Accounting Office of the Federal Government. He was then living at the McLean Gardens apartments, with another fellow-employee, Mr. E. B. Drown, in a bachelor apartment. Mr. McClellan, although then a married man, had been separated from his wife for some time, and that marriage was dissolved by divorce, secured by him, on the ground of voluntary five year separation. He had had one child, a son, of that marriage, who at that time was an adult. In the Fall of 1945, Mr. McClellan moved to 3218 Klinge Road, N. W. as a roomer in the home of Mrs. Morgan, paying her the fixed rental for the room he occupied. Both Mr. McClellan and Mrs. Morgan, then being divorced from their respective spouses, and being lonely individuals, were married to each other on October 19, 1946, after an acquaintanceship of approximately a year and a half.

On November 1, 1946 they executed mutual or reciprocal wills in the office of Joseph D. Malloy, Esq., Columbian Building, Washington, D. C., with two other members of the local bar acting as attesting witnesses, namely, Thomas M. Baker, Esq., and Louis Horowitz, Esq., both of whom, at that time, maintained offices in the Columbian Building on the same floor as Mr. Malloy's office. The McClellans were in Mr. Malloy's office on

this occasion for approximately one hour, for the preparation and execution of their said wills.

At about the same date that these mutual wills were executed, Mr. McClellan changed the designation of beneficiary in his insurance policy to the name of his wife, Mrs. McClellan; and he likewise designated her as the beneficiary of his Civil Service Retirement. Shortly after their marriage, they established a joint bank account, in which he would deposit his salary checks, and against which account they both drew therefrom as needed.

Several days after Mrs. McClellan executed her will of November 1, 1946, she informed her daughter, Mrs. Newby, that she had done so, and stated in general terms the contents of such will, to which Mrs. Newby replied that that was a fair disposition. Mrs. McClellan had very little affection for her son, Marshall M. Morgan, Jr., due to his addiction to alcohol, his abuse of her, and his constant dunning her for money and handouts, and because of those reasons she left him a bequest of only \$500.00 in said will. Mr. McClellan, although he had considerable affection for his son, likewise left to his own son a legacy of only \$500.00 in his will.

This elderly couple then found some happiness together: having friends in occasionally for dinner and a card game, in line with Mrs. McClellan's former custom; they took several trips together; and in general had a happy marital life. Mr. McClellan took an active interest in their home, which was then 3218 Klinge Road, N. W.—on many occasions having employees of the General Accounting Office, on their off-time, make certain repairs, doing painting and paperhanging in and out of the house, and in attending to the landscaping.

In 1948 Mrs. McClellan underwent an operation for the removal of a cataract from one of her eyes, and in the summer of 1950 she sustained a fractured hip as the

result of a fall. This latter injury kept her confined to her bed and home, and she died on November 21, 1950.

In the Spring of 1948, due to increasing medical expenses, frequent complaints of the tenant in 3216 Klinge Road for needed repairs, and the general annoyance of managing rental property, and the further fact that this property had the larger trust encumbrance, Mrs. McClellan determined to sell 3216 Klinge Road, N. W. when she was made what appeared to her to be a reasonable offer of purchase. The agent for Mrs. McClellan in the sale of that property was an old friend of the Morgan family, namely, one Newton Jeffress; and after signing the sales contract, Mrs. McClellan subsequently attended the office of the Lawyers Title Insurance Company, personally, on the date set for settlement under the terms of said contract of sale, and there executed the deed of conveyance. Mr. McClellan, although present at the time of said settlement, was not required to and did not join in the deed of conveyance, since the subject of this sale was her sole and separate property. This property, at the time of said sale, was encumbered by a deed of trust in the approximate amount of \$7500.00. The total sales price under the contract of sale was \$21,500.00, and after deducting the amount of said trust, the salesman's commission, and other title company charges, Mrs. McClellan received a net amount of approximately \$12,000.00. The check representing the net proceeds of this sale was deposited by her, after endorsement, to the aforesaid joint checking account of Mr. and Mrs. McClellan, which they drew against for medical and living expenses.

Mrs. Newby, the daughter, upon learning of the contemplated sale of this property, which had been devised to her under her mother's will, talked with the realty broker and others, but took no legal action to block, forestall or stop such sale, even after having secured legal advice concerning such a proposed step. However, she

did, after the said sale, attempt to get her mother to set up a joint bank account with her, so that the proceeds of said sale could not be used by the mother, or anyone else, except upon the joint signatures of the mother and daughter; to which proposal the mother, Mrs. McClellan, refused to accede.

After the death of Mrs. McClellan, her aforesaid will of November 1, 1946 was filed with the Register of Wills office and a petition for probate thereof was filed by the surviving husband, Alfred D. McClellan, as the nominated executor therein. However, before probate could be granted, Mrs. Virginia Newby, daughter of the testatrix, filed the present petition for caveat, she not being joined therein by her brother Marshall M. Morgan, Jr. After answering the petition for caveat, an order framing five issues therein was signed by the Court (App. 12A). Although Marshall M. Morgan, Jr., had entered a praecipe in the case (App. 13A), by and through the same counsel then representing his sister, he refused to take any active part in said litigation, one way or the other. An effort was made by the caveatee (executor) to have him aligned as a party plaintiff with his sister, but the court refused to align him at such (App. 16A, 19A). Thereafter, the caveatee took the deposition of the caveatrix, upon oral examination, for discovery purposes, and found that there was no credible evidence or genuine issue of fact for such caveat, whereupon the caveatee filed, and argued by counsel, a Motion for Summary Judgment, which motion was denied by the Court (App. 19A).

In due time the caveat came on for trial by jury before Judge Morris, at which time caveatee renewed his motion to align Marshall M. Morgan, Jr., as a party plaintiff, but the trial judge likewise refused to so align him. An order aligning parties was then signed by the trial judge, aligning them as—Virginia M. Newby, plaintiff v. Alfred D. McClellan, Executor, defendant.

At the trial, the trial judge, over objection of the caveatee, allowed the greatest leeway to the caveatrix in attempting to develop the issue of lack of testamentary capacity of her deceased mother, by permitting the plaintiff to delve into matters which occurred over 25 years prior to the execution of the will in question. The only evidence on the part of the plaintiff, on all the issues, was that of the caveatrix herself; her husband, Robert E. Newby; a cousin, Louis L. Griffin; a colored domestic formerly employed by the decedent, named Mary Semley, who at the time of trial was employed by caveatrix; Louise Gilbert, a colored practical nurse who attended the decedent during her last illness; and Dr. Albert E. Marland, a psychiatrist, who had never heard of the testatrix, nor examined her during her lifetime, until approached by plaintiff's counsel to testify as an expert on hypothetical matters. All of these witnesses were either interested in the outcome of this trial, or biased against defendant for matters that had occurred AFTER the execution of the will in question. The pertinent parts of the testimony of such witnesses is printed in the Appendix, and will not be repeated here. There was no testimony on the part of the plaintiff whatsoever, as to the mental capacity of the testatrix on the very day the will was executed, i.e.—November 1, 1946. The general trend of plaintiff's testimony was to the effect that since testatrix had had an unhappy first marriage which terminated in divorce, that she thereafter began to drink alcoholic beverages regularly, and that, by innuendo, same must have had an effect upon her brain. However, even the daughter testified that she always paid her visits to her mother in the mornings, "when the mother was sober."

On behalf of the defendant, caveatee, some thirteen witnesses testified: the attesting witnesses, and counsel who prepared the will in question, as to her mental ca-

capacity on the day and at the very time same was executed; former roomers in the home of the testatrix, as to her mental alertness, her capacity in managing her own financial affairs prior to marriage to the caveatee, her mental capacity at the time of executing an earlier will, in the Spring of 1945, her adeptness at card playing; the clergyman, who officiated at her wedding and marriage to caveatee; the reality broker who handled the sale of real estate for her, some two years after the will in question was executed, as to her capacity to execute a valid deed or contract as of such date of sale; a nurse in attendance during the last illness of testatrix; and several employees of the General Accounting Office, who worked in the home of testatrix, as to her memory, and attention to details being excellent, AFTER the execution of the will in question.

At the trial, counsel for caveator exacted from the witness Mr. Malloy, who was counsel engaged to prepare the will in question, a specimen of his handwriting, since said witness had produced his original longhand notes in corroboration of the contents of the will in question. Such specimens were withdrawn by caveator's counsel, with the court's permission, obviously for the purpose of a handwriting comparison. No handwriting expert was produced to testify as to the results of his examination, at any time during this trial. However, in final argument, counsel for caveator commented upon what the alleged handwriting expert had told him, and upon objection by caveatee's counsel, the court then commented: "Wait a minute. Both of you have gone outside the record on it for just a little bit. You said he had gone over to the F.B.I., and he says he hasn't, and he says it doesn't prove any fraud, and so, while he goes out of the record in saying that, it is a concession, if anything—it is not a claim with respect to it." (App. 304A, 305A). Caveator's counsel had stated, in argument—" * * * I

was concerned—there was so much fraud evidenced in this case that I wanted to see if these papers had been made *five years ago*. * * * I took them out to a specialist, and not the F.B.I., and the specialist said to me ‘My investigation shows these papers as having been written at least *two years ago*.’ ” (emphasis ours).

This argument, based upon the rankest kind of hearsay, and then coupled with the Court’s comment that it was “a concession” (which it most certainly was not), permitted this jury to speculate that since three years of the papers existence had not been explained by the “specialist”, some fraud could therefore be inferred.

In support of the defendant’s Motion for New Trial, an affidavit of one R. Maude Hodgkin, former owner of the sanitarium known as Waverly, was offered and received by the court, which showed that said sanitarium never took “alcoholic” cases; that the testatrix was a patient there on only one occasion, from February 17, 1932 to February 26, 1932, as a “nervous or convalescent patient”, under the care of a private physician; and that she had not been a patient at such sanitarium in 1941 or 1942. (App. 25A). Although this directly contradicted and impeached the testimony of the caveatrix, the trial judge refused to give it any weight in ruling on the Motion for New Trial.

STATEMENT OF POINTS ON APPEAL

(1) The District Court erred in denying summary judgment, due to the absence of any genuine issue of fact as reflected in the pre-trial deposition of the caveatrix.

(2) The District Court erred in refusing to align Marshal M. Morgan, Jr., as a party plaintiff, since he, being the only other heir-at-law of the testatrix, stood upon an equal footing with his sister, the caveatrix.

(3) The District Court erred in receiving into evidence the testimony of Dr. Albert E. Marland; and in thereafter refusing to strike same, upon appropriate motion of the defendant.

(4) The District Court erred in permitting the plaintiff to delve into matters in the past life of the testatrix for a period of more than 25 years prior to the execution of the will in question, this being too remote as bearing on the question of her lack of testamentary capacity on November 1, 1946.

(5) The District Court erred in commenting upon hearsay evidence injected into the case during caveatrix' counsel's final summation, to the prejudice of defendant.

(6) The District Court erred in denying the defendant-caveatee's requested Instructions Nos. 3, 4, 8, and 10 (App. 300A, 301A, 303A, 304A), and in amending by deletion the final paragraph of Instruction No. 2 (App. 300A); and in granting Caveator's Instructions Nos. 1, 3, 5, 7, 8, 11, and Court Instruction A. (App. 297A, 298A, 299A).

(7) The District Court erred in denying the defendant's Motion for Judgment N.O.V., or in the alternative for New Trial.

(8) The District Court erred in refusing to direct a verdict for the defendant-caveatee at the end of the plaintiff's case (App. 179A); and again erred in refusing to so direct a verdict at the conclusion of all the evidence (App. 296A.)

SUMMARY OF ARGUMENT

1. In a will contest, where the principal issue is the alleged lack of testamentary capacity on the part of the testatrix, the evidence tending to show such alleged lack of capacity should be confined to a period reasonably before and immediately following the execution of such contested will, and it is error for the trial court to permit a caveator to delve into the past life of a testatrix, marital and domestic, for a period of 25 to 30 years prior to the execution of such contested will.

II. In a will contest, where the principal issue is the alleged lack of testamentary capacity on the part of the testatrix, it is error for a trial court to admit medical evidence of a psychiatrist in the nature of a dissertation on the general effect of alcohol on a human brain, especially when such psychiatrist never saw, examined or knew the particular testatrix, and testified only in answer to hypothetical questions based upon only partial evidence of the caveator, and upon no evidence of the caveatee; and the foregoing is especially true when such answers to hypothetical questions are not based upon evidence of the testatrix' mental condition on the very day of the execution of her will.

ARGUMENT

I. The District Court Erred in Denying Summary Judgment, Due to the Absence of Any Genuine Issue of Fact as Reflected in the Pre-Trial Deposition of the Caveatrix.

On March 21, 1951, the deposition of the caveatrix was taken upon oral examination by the caveatee, at which time she was closely interrogated upon each of the five issues set forth in her petition for caveat. This deposition is made a part of the record on this appeal; and from same, it can be readily seen that:

(a) On her issue of the will of November 1, 1946 not being the *last* will and testament of the decedent, such allegation is completely negated by the testimony of the caveatrix on pages 12, 13 and 14 of such deposition. As a matter of fact, the caveatee proved, in defense of the will in question, that the testatrix had in fact executed an *earlier* will, in the Spring of 1945, which was attested by the witnesses Yelverton (App. 183A) and Dixon (App. 205A). Both of these witnesses testified as to the mental capacity of the testatrix to execute a valid will, deed or contract as of that time, i.e. the Spring of 1945 (App. 184A & 206A). There was absolutely no evidence of any other will, other than the one under contest, dated November 1, 1946, from either side.

(b) The allegation of the caveatrix to the effect that the attesting witnesses to the will of November 1, 1946 did not attest the testatrix' signature, was likewise completely devoid of evidence, as was shown in the said deposition on pages 17 and 18 thereof. As a matter of fact, on this issue of "attestation and execution in due form, as required by law", the trial judge directed a verdict in favor of the caveatee (App. 21A).

(c) The allegation in the petition for caveat to the effect that the testatrix lacked testamentary capacity was shown to be completely devoid of proof by the caveatrix' answers in her deposition, on pages 19, 20, 23, 26 and 28. In fact, she testified—"I do not know the exact condition of her on that day, but I know most of the time she was under the influence of alcohol." (Dep. 19). When asked if her mother was in an alcoholic daze on November 1, 1946, she answered,—when asked if she had any personal knowledge thereof—"No, because I was not aware of the fact that she had gone down to have the will executed until after it was." (Dep. 20) When asked as to whether her mother was competent to make the

several rental contracts for her house, and rooms, she answered "Yes" (Dep. 26).

(d) Her allegations as to fraud and deceit, in her petition for caveat, were likewise shown to be absolutely devoid of credible evidence, as appears from her deposition on pages 29, 30 and 34. When asked if she knew the contents of the will two days after it was drawn, and that she had been told same by her mother, she replied—"Yes, yes; but I never saw the will." (Dep. 29) When asked—"So your entire basis for paragraph four of item three, as to "fraud and deceit", is due to the fact that you were not consulted?" she replied—"That is correct." (Dep. 34)

(e) Her allegations as to undue influence, duress and coercion were so vague and indefinite, and so devoid of proof, as appeared from her responses in said deposition on pages 33, 36, and 37 thereof. When asked—"Didn't you feel that the execution of a will was, after all, your mother's business?" she replied—"That is the way I looked at it after it was done. There was nothing else I could do." When asked by counsel—"So you deduce from the fact it (the will) was executed two weeks after their marriage that there must have been undue influence brought to bear?" she replied—"Yes, because I cannot see where they were in that big hurry to make a will unless he had some purpose behind it." (Dep. 35) When asked the direct question—"What evidence of pressure do you have exercised by Mr. McClellan which caused or induced your mother to execute this will?" she answered—"Well, I did not see him intimidate her, or anything like that, but I just assumed she had been told that is what he wanted done, and anything he told her he wanted done, she usually did." (Dep. 36).

This pre-trial deposition fully developed the weakness and the flimsiness of the petition for caveat, and conclu-

sively showed that there was no genuine issue of fact for trial by jury. This trial commenced on May 11, 1951, and concluded with the verdict in question on May 23, 1951. This covered a period of nine court days. To avoid such protracted hearings on such flimsy issues was the very purpose behind the drafting of Rule 56 (b) and (c), F. R. C. P., which is the rule governing Summary Judgments. The aforesaid rule provided—" * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Court has had occasion in many cases, to interpret the foregoing rule. In—*Dewey v. Clark*, 86 U. S. App. D. C. 137, 143, 180 F. 2d 766, Judge Fahy, speaking for the Court, after an extensive review of decisions of the Supreme Court, stated—"There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract."

In—*American Airlines v. Ulen*, 87 U. S. App. D. C. 307, 186 F. 2d 529, this Court, in affirming a summary judgment awarded plaintiff in a negligence action, again had occasion to discuss the matter of formalism versus genuineness of issues, and held that from interrogatories and answers thereto on file in that case, negligence and

proximate cause were sufficiently established so as to justify entry of summary judgment for the plaintiff.

Wherefore, appellant contends that it was error for the District Court to have denied his motion for summary judgment herein, based upon the caveatrix' deposition, and the existence of purely formal issues in this matter.

II. The District Court Erred in Refusing to Align Marshal M. Morgan, Jr., as a Party Plaintiff, Since He, Being the Only Other Heir-at-Law of the Testatrix, Stood Upon an Equal Footing With His Sister, the Caveatrix.

Although Marshal M. Morgan, Jr. had entered a praecipe in this action, by and through the same counsel who represented his sister (App. 13A), and stated therein that he did not intend to become a party to this case and "waived all his rights to appear in this action", he was nevertheless a proper party, and being an heir, had a similar and comparable interest in the outcome of this trial. If the will was sustained, he would benefit by only \$500.00; if the will was denied probate, he would become an equal shareholder in the realty, with his sister.

Rules 19 and 20, F. R. C. P., concerning Joinder of Parties, so clearly expresses the situation as to admit of no question.

Although the Supreme Court has held, in—*Niles-Bement Pond Co. v. Iron Moulders Union Local No. 68*, 41 S. Ct. 39, 65 L. Ed. 145, that "there is no prescribed formula for determining in every case whether a person is an indispensable party", the question obviously depends upon the nature and extent of that person's interest in the controversy.

Indispensable parties are those who have such an interest in the subject matter that a final decree cannot be made without either affecting their interests or leaving

the controversy in such condition that a final determination may be wholly inconsistent with equity and good conscience.—See—*Wesson v. Crain*, C. C. A. 8th, 165 F. 2d 6.

The test of indispensability therefore is whether the absent person's interest in the controversy is such that no final judgment or decree can be entered which will do justice between the parties actually before the court, without injuriously affecting the rights of others not brought into the action. —See—*Chance v. Buxton*, C. C. A. 5th, 170 F. 2d 187.

To the same effect, see—

Flynn v. Brooks, 70 App. D. C. 243, 105 F. 2d 766
Brown v. Christman, 75 U. S. App. D. C. 203, 126 F. 2d 625.

III. The District Court Erred in Receiving Into Evidence the Testimony of Dr. Albert E. Marland; and in Thereafter Refusing to Strike Same, Upon Appropriate Motion of the Defendant.

This Court has repeatedly held that under the claim of privileged communications, it is error to admit the testimony of an attending physician as bearing on the question of a testator's lack of testamentary capacity.

In—*Stafford v. American Security & Trust Co.*, 60 App. D. C. 380, 55 F. 2d 542, in affirming a directed verdict in favor of the caveatee, this Court, in commenting on the testimony of a physician who had attended the testatrix, which testimony had been offered by the caveator, held that a physician cannot testify to anything learned from testatrix while acting as her physician.

In—*Labofish v. Berman*, 60 App. D. C. 397, 55 F. 2d 1022, medical evidence of an attending physician of a testator, was offered by the caveatee—(nominated executor), to show the mental condition of the testator imme-

diately prior to and at the time of his death. In sustaining the refusal of the trial court to admit such evidence, this Court stated—"It is perhaps sufficient to say, as to this, that the issue was not the ability of the testator at a time immediately before his death to make a will, but as of the time it was made—in this case, almost a year and a half prior to his death. He might have been ever so insane or ever so sane when he died without affecting his ability one way or the other to make a will a year and a half before, but we do not rest the affirmance of the lower court's action on this ground, but rather on the fact, as has been heretofore stated a number of times, that under the District of Columbia statute on the subject, a physician may not be permitted to testify (except by the consent of the patient or his legal representatives) as to any matter which has come to his knowledge strictly out of his professional relationship to the patient."

Much earlier, in the celebrated case of *Brosnan v. Brosnan*, 54 App. D. C. 73, 294 Fed. 1004, which case settled the question as to which side had the burden of proof on the question of lack of testamentary capacity in a will contest, this Court had occasion to consider this subject. In the trial court, objection had been made by the executor to the competency of a physician to testify touching the mental condition of the testator. Although the executor did not appeal, one of the beneficiaries under the will did appeal, and the verdict and judgment setting aside the will in question was reversed, on the question of burden of proof: the court holding that the beneficiary could not avail himself of an objection made by the executor, who had not appealed.

Therefore, since the decisions of this court prohibit an attending physician to testify as to matters touching the capacity of a testator, when offered by either side, it seems, a fortiori, that medical evidence of a physician, who never saw or heard of or examined the testator, should be excluded, when based only upon hypothetical

questions embracing only a part of the whole evidence. Such testimony could have had only one effect, and that to prejudice the defendant herein, since such testimony came from a man engaged in one of the learned professions, which fact ipso facto would tend to give it greater weight than the testimony of lay witnesses. We might all concede that the prolonged and habitual use of alcoholic beverages will tend to cause deterioration of a human mind; but there was absolutely no evidence in this case that the mind of the testatrix was so affected as to render her incompetent to make a valid deed, contract or will on November 1, 1946. Her addiction to alcohol some three or four years after the execution of her will, in possibly a mistaken belief that such use would alleviate her pain from the fractured hip and other physical infirmities, could have had no bearing whatsoever on her capacity to make a valid will on November 1, 1946, and it was error to permit such evidence for that purpose, since it was too remote.

A hypothetical question addressed to an expert, seeking his opinion upon the question of sanity or insanity, must be so framed as fairly to reflect the facts admitted or proved by other witnesses.—*Burgo v. State*, 26 Neb. 639, 42 N. W. 701.

Questions put to experts relating to the issue of insanity should be disallowed where the facts assumed were unsupported by the evidence, or where the question was too indefinite to justify the giving of an opinion, or the question required the witness to decide facts which, if material, were for the jury. See—*State v. Scott*, 41 Minn. 365, 43 N. W. 62.

An omnibus question in a will contest presenting a hypothesis covering many things of which there was no proof or offer of proof, including conditions necessarily indicating insanity as well as facts which might co-exist with a state of mental soundness, and going not only into the history, eccentricities, and physical condition of the testator but into the personal traits of his

relations, is objectionable as tending to induce the jury to suppose that each of the enumerated circumstances indicated insanity, and to leave them at discretion to decide whether the will was suitable and proper and satisfied their judgment. See—*Fraser v. Jenison*, 42 Mich. 206, 3 N. W. 882.

A hypothetical case submitted for the opinion of the expert on the question of insanity in a will case containing only a partial statement of the material evidence adduced should be excluded.—*McCullough's Will*, 35 Pittsburgh Law Journal 169. To the same effect, see—

In re Russell's Estate, 189 Cal. 759, 210 Pac. 249

Coughlin v. Cuddy, 128 Md. 76, 96 Atl. 869

In re Stephen's Estate, 244 Mich. 547, 222 N.W. 128.

IV. The District Court Erred in Permitting the Plaintiff to Delve Into Matters in the Past Life of the Testatrix for a Period of More Than 25 Years Prior to the Execution of the Will in Question, This Being Too Remote as Bearing on the Question of Her Alleged Lack of Testamentary Capacity on November 1, 1946.

In view of this Court's pronouncement in—*Labofish v. Berman*, supra, it hardly seems appropriate to labor this point, as it is fundamental law that the test is not her capacity years before a will was made, but what her capacity was at the very time of making the will in question.

In the instant case, the trial court permitted the caveatrix to detail the events surrounding her first marriage, in 1903; her social life upon first arriving in Washington, about 1911; the events leading up to her divorce from her first husband, in 1934; her prior trips to England to visit a sister, prior to her separation from Mr. Morgan in 1932; a trip to a brother-in-laws' ranch, in New Mex-

ico, in 1937, at which time it was testified that she was in bed several days, on one occasion, from drinking beer; that on about four occasions, between the summer of 1941 and February of 1942, she had slipped in the bathtub while bathing, and that a nephew had been summoned from his work to help her out of the tub.

All of the foregoing was over objection of the caveatee, and the trial judge, although stating that he recognized the critical period to be November 1, 1946 (date of execution of the will), stated, at one point (App. 130 A):

“THE COURT: I have let in evidence, I think, touching and going back almost to her childhood. I think I will admit it. I need not again repeat that I think the only critical time as to this decedent’s testamentary capacity is at the time of the execution of the will that is here involved, or the paper writing purporting to be a will. This other evidence is material only insofar as it may or may not throw light on that particular critical period. But I do think it is admissable on that ground.”

Just how the foregoing evidence could throw light “on that particular critical period” (i.e. Nov. 1, 1946), is beyond the comprehension of counsel. And yet, realizing that the critical period was November 1, 1946 (on which date the caveatrix had no evidence whatsoever), the trial judge then permitted the introduction of evidence covering the four years AFTER the execution of the will, even including evidence of events on the very date of her death, which were obviously calculated to inflame and prejudice this jury.

V. The District Court Erred in Commenting Upon Hearsay Evidence Injected Into the Case During Caveatrix' Counsel's Final Summmation, to the Prejudice of Defendant.

During cross-examination of the witness MALLOY, who was the attorney who drafted the will in question, counsel for the caveatrix exacted from him a specimen of his handwriting. (App. 231A) This was then offered and received in evidence as Plaintiff's Exhibit No. 1. (App. 232A) This was apparently done under the belief that the witness' original notes taken by him preparatory to drafting both Mr. and Mrs. McClellan's wills, which original notes were offered in evidence as defendant's exhibits (App. 229A) were not written on paper existant in 1946, or about November 1 of said year. Counsel for caveatrix later secured permission from the court to withdraw both of the defendant's exhibits (such original longhand notes), as well as Plaintiff's Exhibit No. 1 (App. 236A). This was obviously for the purpose of having a handwriting expert or paper expert make an analysis of same. However, nothing further was mentioned concerning these exhibits, until plaintiff's final summation to the jury, when he stated as follows:

"* * * And I will say to you ladies and gentlemen, without hesitation, that I took these papers and the FBI hasn't seen these papers between the time I took them and brought them back to the Court. I was concerned—there was so much fraud evidenced in this case that I wanted to see if these *papers had been made five years ago*. * * * I took them out to a specialist, and not the F.B.I., and the specialist said to me "My investigation shows these papers as having been *written at least two years ago*." (emphasis added)

Defense counsel promptly objected to this line of argument as presenting the rankest kind of hearsay, since the alleged specialist had not been called to testify, or he sub-

jected to cross-examination, and since it amounted to testimony by counsel for caveatrix. However, the trial judge, instead of reprimanding plaintiff's counsel, or sustaining the objection, or instructing the jury to disregard the above statement, merely added to the prejudicial statement of counsel, by commenting as follows:

"THE COURT: Wait a minute. Both of you have gone outside the record on it for just a little bit. You said he had gone over to the F.B.I., and he says he hasn't, and he says it doesn't prove any fraud, and so, while he goes out of the record in saying that, *it is a concession, if anything*—it is not a claim with respect to it." (emphasis added)

The statement of counsel for caveatrix that the specialist had said to him that the papers, from his investigation, were written "at least two years ago" still left a gap of three years unexplained (from the plaintiff's standpoint). The jury might have inferred from that remark that the witness had prepared the papers deliberately, for use as evidence in a contemplated will contest, rather than being just what they were, i.e.—items of original entry offered as corroboration of the will made Nov. 1, 1946. The court's comment that this amounted "to a concession" was nothing of the sort, and amounted to a tacit approval of plaintiff's counsel's argument, with its natural inferences.

To infer that a reputable member of the bar would deliberately manufacture evidence, and then not back up such obnoxious inference with credible evidence, is, to put it mildly, reprehensible. Mr. Malloy, having testified as a material witness, could not, under the ethics of his profession, and the decisions of this court, then argue his own credibility. See *Callas v. Independent Taxi Owners Association*, 62 App. D.C. 214, 66 F. 2d 192.

And since this prejudicial argument came in the final summation of plaintiff's counsel, counsel for caveatee had no opportunity to reply to same. To use a boxing term, this at least, was "hitting below the belt."

In *Washington & O.D. Ry. Co. v. Dulany*, 53 App. D.C. 73, 288 Fed. 421, this court, in discussing prejudicial remarks of counsel during a trial, stated:

“Where counsel persists in making statements, unsupported by the evidence and designed to prejudice the case of his opponent, where he makes a withdrawal only to repeat the offense as to other matters not in evidence, and thereby indicates lack of good faith and a purpose to mislead and bias the jury, we are not prepared to say that repeated withdrawals and repeated instructions would avail to remedy the evil done.”

VI. The District Court Erred in Denying the Defendant's Requested Instructions Numbered 3, 4, 8, and 10, and in Deleting the Final Paragraph of Prayer No. 2, and in Granting Caveator's Prayers Numbered 1, 3, 5, 7, 8, and 11, and Court Instruction No. A.

The requested prayers for instruction, as well as those granted, are set forth verbatim in the Appendix, at pages 297A et seq. and need not be repeated here.

Defendant's requested instruction No. 3 was framed from the language of this Court in the case of *Gibson v. Collins*, 55 App. D.C. 265, 4 F. 2d 874, which, although not a will contest, did involve the question of setting aside a deed on the alleged ground of lack of capacity to understand the nature of the act, which is similar to the alleged lack of testamentary capacity.

Defendant's requested instruction No. 4, denied by the trial judge, was based upon the language of this Court in *Barbour v. Moore*, 4 App. D.C. 535, 547, and *Thompson v. Smith*, 70 App. D.C. 73, both of which were will contests.

The trial judge denied Requests Nos. 3 and 4, and substituted therefor its own “Court Instruction B” (App. 302A), which was a much milder instruction than those requested by defendant under Nos. 3 and 4.

Defendant's requested instruction No. 8, on the weight to be given the testimony of attesting witnesses to a will as to the testatrix' testamentary capacity, was denied by the trial court. That prayer was based upon the decisions in two Maryland cases, i.e. *Brooke v. Townshend*, 7 Gill. 10, and *The Berry Will Case*, in 93 Md. 560, 49 A. 401, and on the decision of this Court in *Robinson v. Duvall*, 27 App. D.C. 535, affirmed in 207 U.S. 583, in which cases greater weight was accorded to the testimony of attesting witnesses as opposed to that of lay witnesses, since the lay witnesses lacked the opportunity given to the attesting witnesses to form an opinion of the testatrix's capacity at the very moment when she executed her will.

Defendant's requested Instruction No. 10, dealing with the presumption arising from the unexplained failure of a party to call stronger witnesses on material points, when within such party's power to do so, was denied by the trial judge. This request was based upon the unexplained failure of the caveatrix to call either or both of her daughters, (Mrs. Leonard Williams, aged 24, or Jane Newby, aged 17) (App. 45A); her brother, Marshal M. Morgan, Jr., the only other heir-at-law of this testatrix; or the "many friends" of the testatrix, whom the caveatrix claimed were alienated by the drinking propensities of the testatrix. Such a requested prayer is almost standard, and has been approved by this Court on several occasions. See *Chesapeake Beach R. Co. v. Brez*, 39 App. D.C. 58, 71; *Carmody v. Capital Traction Co.*, 43 App. D.C. 245, 250, 251.

The final paragraph of defendant's requested Prayer No. 2, which was deleted by the trial judge and otherwise granted, had been approved in substance by several Maryland decisions. See *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Home of the Aged, etc. v. Bantz*, 107 Md. 543, 69 A. 376.

VII. The District Court Erred in Denying the Defendant's Motion for Judgment N.O.V. or in the Alternative For New Trial.

For the reasons set forth in the first six assignments of error herein, plus the failure to give to the affidavit of Miss R. Maude Hodgkin the weight to which it was entitled, since it completely contradicted and impeached the testimony of the caveatrix, the trial judge erred in refusing to enter judgment notwithstanding the verdict, or in the alternative, in refusing a new trial hereon. This court's attention is directed also to the fact that this jury, which had heard evidence on parts of nine separate trial days, deliberated, (if they did at all), for no more than forty-five minutes. That fact in itself is indicative of a prejudicial and biased attitude, since they in that short time resolved all of the issues, as framed in the order for trial, against the defendant-caveatee.

VIII. The District Court Erred in Refusing to Direct a Verdict for the Defendant-Caveatee at the End of the Plaintiff's Case; and Again Erred in Refusing to Direct a Verdict for the Defendant-Caveatee at the Conclusion of All the Evidence.

This error is so patent from a review of the foregoing assignments of error, particularly as set forth in Argument U; and from even a casual review of the plaintiff's evidence as set forth in the Appendix, that it is earnestly felt that no case was made for submission to this jury on any genuine issue of fact; and that this jury was simply permitted to speculate on what they had heard, which consisted of nothing more than conclusions, suspicions, and innuendoes, fanned and inflamed by the prejudicial arguments of plaintiff's counsel.

CONCLUSION

In conclusion, and in view of the foregoing authorities and argument, it is respectfully submitted that the judgment of the District Court, based upon the verdict of this jury, should be reversed, and judgment entered for the caveatee notwithstanding such verdict.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,222

ALFRED D. McCLELLAN, Executor of Estate of Anne G.
McClellan, Deceased, *Appellant*,

v.

VIRGINIA M. NEWBY, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 18 1952

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STATEMENT OF QUESTIONS PRESENTED.

1. In a will contest where lack of testamentary capacity, fraud, and undue influence are alleged, is it error to permit evidence showing decedent's continual addiction to alcohol for a number of years prior to the execution of her will, with resulting physical and mental deterioration, where such testimony is considered only insofar as it bore on her mental powers at the time of the execution of the will?

2. In a will contest where lack of testamentary capacity, fraud, and undue influence are alleged, is it error to permit an expert medical witness to answer a hypothetical question based upon evidence previously given where the expert witness does not answer categorically whether decedent was or was not mentally incompetent at the time she executed her will?

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IN THE

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v.

VIRGINIA M. NEWBY, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLEE.

COUNTERSTATEMENT OF THE CASE.

Appellant's statement of the case covers eight pages but contains only eight references to where these purported facts can be found in the joint appendix. Appellant's statement of the case is replete with suppositions, unsupported conclusions, and arguments. Appellee therefore submits the following as her counterstatement of the case.

Anne G. McClellan (hereinafter referred to as the decedent), mother of appellee, was married to M. Marshall Morgan in 1903 (J. A. 45). In 1911 the Morgans moved to Washington, and in 1923 to Klinge Road (J. A. 67). In the same year appellee married Robert E. Newby (J. A. 139). The Newbys stayed with her parents for three years thereafter until appellee's first child was born. A year and a half later appellee returned to her parents' home at decedent's request and remained at one or the other of the Klinge Road properties until 1941 when the Newbys moved to Chevy Chase, Md. (J. A. 46, 91, 142, 146).

In 1932 decedent had a serious operation after which she began to be difficult at home and began to drink. In 1932 Mr. Morgan left decedent, and divorced her in 1934. By 1934 decedent had begun to drink quite a bit (J. A. 50, 69). After the divorce decedent developed a groundless antagonism toward her son-in-law, Mr. Newby, with whom she had previously been friendly, her animosity being evidenced when she was drinking (J. A. 51, 139-41, 147). By 1940 this antagonism had become more severe and was profanely expressed (J. A. 52). Decedent by then had a similar antagonism toward appellee's younger child, Jane. As a result the Newbys consulted a psychiatrist, and thereafter moved to Chevy Chase (J. A. 52, 53, 141-142). Between 1934 and 1940 decedent had increased her drinking until she had become a complete alcoholic (J. A. 50). By 1940-41 decedent would frequently go for days without eating, taking liquor instead, and was unable to physically take care of herself (J. A. 51, 73, 130-31, 136). As her alcoholism progressed it became necessary for doctors to be called in to control her. In 1942 a doctor recommended that she go to the Greenhill Institute for alcoholics, where she remained for a period of ten days (J. A. 90). After that time Mrs. Newby removed her at the request of Greenhill. Decedent continued drinking thereafter (J. A. 53). After that at least four doctors were called in from time to time to treat decedent for cirrhosis and alcoholism (J. A. 61).

The doctors said they could do nothing except to help her temporarily (J. A. 73).

Mrs. Newby visited her mother every day after moving to Chevy Chase until decedent's marriage to appellant, McClellan. After that Mrs. Newby continued to visit her mother daily but not always on week-ends (J. A. 54, 98). She was "a very devoted daughter" (J.A.187). Between 1941 and her marriage to McClellan in 1946 decedent had increased her drinking and stayed in bed most of the time; her memory had become such that in the afternoon she would be unable to recall her daughter's visit in the morning, would repeat stories immediately after telling them, and would misplace things (J. A. 54, 55). By 1946 decedent had developed cirrhosis of the liver and, due to the state of her nerves, was unable to walk at a steady gait. She had several times fallen downstairs, was afraid of them, and would not leave the house alone (J. A. 56). By this time decedent's friends had all but deserted her (J. A. 57, 87).

Decedent had attempted to commit suicide by the use of gas in 1938 (J. A. 64) and sometimes threatened or pretended suicide (J. A. 65, 109-10). While under the influence of alcohol she often would stand up and throw her arms back and roll her eyes back and her head around and say she was dying (J. A. 66).

At decedent's request the Newbys stayed with her (J. A. 139) for 18 years, living either with decedent or in the house she owned next door (J. A. 72). The Newbys paid all bills, repairs, food and expenses, by agreement, in lieu of rent (J. A. 74, 147, 153).

Upon the departure of the Newbys decedent took in three roomers, including a close friend and a relative (J. A. 91-92, 135). The roomers would give decedent the monthly rental by bringing it to her room, where she was usually in bed, putting it on a coffee table beside the bed and saying, "Here is the rent" (J. A. 135). The house next door belonging to decedent was rented (J. A. 136). Decedent

at this time was drinking heavily and starting quite early in the day. She was in a rather fuzzy or foggy condition most of the time (J. A. 131).

Between the spring and fall of 1945 appellant met decedent and moved into her home (J. A. 238, 268). Appellant was then married, but before he moved in decedent suggested marriage to him but appellant did not agree to it. Decedent suggested that it would be more convenient if he moved in (J. A. 267). On the 13th of August, 1945, appellant filed suit for divorce from his wife and in his complaint swore that he had resided at 3218 Klinge Road for one year (J. A. 268). Appellant testified that he may have made a mistake but thinks he was telling the truth at trial (J. A. 269). Appellant had previously testified in his deposition that his first wife had instituted the divorce proceedings against him on "a lot of trumped up stuff," cruelty, and that he had not contested it or appeared in court (J. A. 270-71). In his deposition appellant also swore that he had not seen his wife since 1940 when he deeded over a house to her. At the trial appellant admitted that he had seen his first wife some time after that when they deeded the house to a straw man, who then deeded it back to her, on June 12, 1943 (J. A. 272-73). Attorney Joseph D. Malloy, who had represented appellant in the divorce proceedings, was present at the taking of the deposition (J. A. 232-33, 238).

When appellant moved to decedent's house only one roomer, Mrs. Yelverton, remained (J. A. 182). On October 17, 1946, appellant's divorce became final (J. A. 257). On October 19, 1946, appellant married decedent (J. A. 269). Appellant at that time was earning \$4300 per annum (J. A. 281). An unpaid judgment \$388.90 was outstanding against him (J. A. 273-74, 295). Decedent then had an income of at least \$310 a month (J. A. 267-68). Upon her marriage decedent's income was reduced by \$100 a month (J. A. 240-41). On the day of the wedding appellee helped decedent dress. Decedent had had at least one drink be-

fore the ceremony but was not completely drunk. Decedent expressed herself as being glad she was going to make the whole thing legal (J. A. 94-95).

Mrs. Newby attended the wedding. Although she did not think her mother was competent (J. A. 102), at that time she made no objection because she wanted her mother to be happy; her mother had been sad and lonely for a long time (J. A. 97), her friends had deserted her (J. A. 57, 87), and Mrs. Newby had no reason at that time to believe that appellant had any ulterior motives (J. A. 96-97).

After the wedding appellee avoided decedent's home on week-ends because Mr. and Mrs. McClellan were usually drunk (J. A. 98). Appellant often brought home whisky, and decedent ordered it by telephone (J. A. 279). Decedent would do anything appellant asked her to do regardless of her own wishes (J. A. 59-60). Decedent was then in a mental fog or stupor (J. A. 142).

At the time of her marriage decedent had complete confidence in appellant (J. A. 275). When appellant told decedent that he had made her the beneficiary of his Civil Service retirement fund and life insurance policy (\$750), she said she wanted to be fair and she wanted him to have a home as long as he lived (J. A. 243, 276). Thereafter appellant telephoned, on Nov. 1, 1946, and made an appointment with Mr. Malloy for the preparation of their wills (J. A. 243, 227). Appellant thought decedent had a will when he married but does not know what became of it (J. A. 275). Mr. Malloy typed the wills and retained them after execution (J. A. 228, 235). The witnesses were in the room 5 or 10 minutes and 15 or 20 minutes, respectively (J. A. 35-36, 43).

Appellant had not executed an assignment of his retirement fund, as he had represented to his wife, prior to November 1, 1946. He executed this instrument on November 4, 1946 (J. A. 277, 314). Decedent had told appellant that she wanted her daughter, Mrs. Newby, to have 3218 Klinge after his death. Decedent also left 3216 Klinge to Mrs. Newby in her will. Appellant testified that he was trying to carry out decedent's wishes regarding 3218

Klinge when he bequeathed this property to Mrs. Newby in his will (J. A. 278). Decedent was never told the difference between a life estate with a remainder in fee and a fee simple bequest (J. A. 235).

Appellee first learned of decedent's new will several days later when decedent told her about it. Decedent told appellee at that time that she had left 3216 Klinge to her and 3218 Klinge to appellant for his lifetime and upon his death it was to come to appellee (J. A. 57-58). Appellee was asked by decedent if she considered this arrangement fair, and appellee replied that it was more than fair. Appellee was not told that appellant had also executed a will (J. A. 98-101). After decedent's death appellant told appellee that 3218 Klinge was his for his lifetime and upon his death it was to go to her (J. A. 59). Appellee did not think decedent competent to make a will on Nov. 1, 1946, regardless of how she disposed of her property (J. A. 101-02).

In March of 1948 appellee learned from decedent's maid, Mary Semley, who lives with appellee, that appellant had been discussing the sale of 3216 Klinge with a real estate agent, C. Newton Jeffress (J. A. 102-104). Appellant had promised Mary Semley a home if she would not tell appellee about the sale of the house (J. A. 119, 127). Mary Semley had been previously offered \$100 by appellant to swear falsely to obtain a warrant for Marshall Morgan, Jr. (J. A. 118). Appellee felt decedent was incompetent and called Mr. Jeffress shortly after hearing of the proposed sale. She was told it was too late to stop the sale (J. A. 105, 197-98). Mr. Newby was informed by lawyers that it was too late to stop the sale (J. A. 105). Appellant told Mr. Jeffress that the contract sounded all right to him but that he would think it over and let Jeffress know. Mr. Jeffress suggested that decedent take back a deed of trust on the property for the protection of her interests, but no trust was taken back (J. A. 202). Mr. Jeffress testified that decedent was "verging" on being an alcoholic in 1943

(J. A. 200-01). Jeffress made a commission of \$1075 on this transaction (J. A. 197). The net proceeds of the sale, some \$12,000 were deposited in decedent's and appellant's joint account (J. A. 246). It was spent for household expenses, medical bills, trips, \$5,000 in War Bonds, and a Nash car for appellant (J. A. 259-60). According to the petition for probate decedent had no money or bonds at her death (J. A. 5). Appellee never took any action to set aside the sale because she was unwilling to drag her mother into court (J. A. 105-06, 108).

About this same time appellee was informed that appellant had taken decedent's very large diamond ring downtown to sell it. Decedent had always told appellee that the ring would be given to appellee's elder daughter on her 21st birthday; this occurred shortly before appellee's elder daughter's 21st birthday. About \$1300 was received for the ring (J. A. 64, 281).

In 1948 decedent had an operation for removal of a cataract on her eye (J. A. 248). After this appellant took charge of her financial affairs (J. A. 264-65). In the summer of 1950 decedent fell and broke her leg. Appellant engaged a practical nurse to attend decedent during the day. No one else was there during the day except the nurse and appellee who visited her mother daily (J. A. 85, 211). The practical nurse, Cora Lee Canty, fixed drinks for decedent beginning at 10 a. m. (J. A. 213). Appellee refused to bring decedent liquor (J. A. 86). Decedent was also being treated for her liver (J. A. 214). Decedent at this time was mentally unsound (J. A. 87).

After decedent broke her leg appellant began to be absent on weekends, which distressed decedent (J. A. 97-98). Another practical nurse, Louise Gilbert, testified that decedent demanded drinks, starting at 8 a. m., and continued to drink all day. The doctor had ordered decedent to have less liquor, and appellant at one time told Louise Gilbert not to give decedent so much to drink. At another time appellant instructed Louise Gilbert to give decedent a drink

(J. A. 285-86). Sometimes Louise Gilbert brought a small bottle of whisky to decedent so she could rest at night (J. A. 293). Appellee visited her mother almost every day and nursed her. Decedent looked forward to these visits (J. A. 287, 291). Appellant called his wife profane names when he was drinking (J. A. 286). Decedent "seemed to be afraid of him" and asked Louise Gilbert to spend the night with her and to lock the door (J. A. 287).

Appellant told Louise Gilbert to keep her eyes and ears open for anything Mrs. Newby might say about decedent's will because appellant had been left everything in the will and he was afraid decedent would make a new will, or appellee would contest the will (J. A. 285-86, 293). When appellant gave Louise Gilbert these instructions he said he had just consulted his lawyer and the lawyer had told him to just sit tight (J. A. 286).

Appellant was in decedent's room on the night of her death and was drinking. He then told the nurse to get decedent a drink. Appellee told him to leave the room, which he did (J. A. 112, 143-144).

About 10 days after the death of decedent, appellant called appellee and told her that the will was going to be filed for probate, that he wanted to know if she understood the terms of the will, and that it was his house for his lifetime and upon his death it was to go to appellee (J. A. 59).

Dr. Marland was called as a witness by appellee. Appellant conceded his qualifications (J. A. 156). Dr. Marland had never met decedent (J. A. 159). In response to a hypothetical question, based on facts developed in the testimony, Dr. Marland answered that whether or not decedent was of sound and disposing mind on Nov. 1, 1946, depended on how serious decedent's actual deterioration was (J. A. 174-75, 178). Dr. Marland also testified that as alcoholism continues a person can be persuaded more easily than a normal person to do things he or she would not do otherwise (J. A. 175-76).

Regarding Mr. Malloy's pencilled notations used in preparing the will, which appellant mentions (Br. 9-10), appellee's counsel clearly stated in his summation, "Mr. Malloy was not guilty of any irregularity on these" (J. A. 305). This matter was first brought up by appellant's counsel falsely accusing Mr. Newby of using the facilities of the F. B. I. to investigate this case (J. A. 304).

STATUTES INVOLVED.

Title 19, section 307 (29:57) Caveat—Will not to be probated while issues pending.

If, upon or prior to the hearing of the application to admit the will to probate, any party in interest shall file a caveat in opposition, duly verified, and setting forth facts inconsistent with the validity of the will, the said will shall not be admitted to probate until the issues raised by said caveat shall be determined, as hereinafter directed.

Title 19, section 312 (29:62). Trial of issues as to wills—Trial by jury—Notice—Service to absent parties not essential for jurisdiction—Judgment.

Whenever any caveat shall be filed, issues shall be framed under the direction of the court for trial by jury: *Provided*, That in all cases in which all persons interested are sui juris and before the court the issues may be tried and determined by the court, without a jury, upon the written consent of all such parties. If they are to be tried by a jury, they shall be triable in said probate court by petit jurors drawn for service in the District Court of the United States for the District of Columbia; and at least ten days prior to the time of trial all of the heirs at law or next of kin of the decedent, or both together, as the case may require, and all persons claiming under the will in question, or any other instrument on file purporting to be a will of the decedent, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any one of them be an infant or of unsound mind he shall have a guardian ad litem appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned

"not to be found," the court shall assign a new day for such trial, and shall order publication, at least twice a week for a period of not less than four weeks, of the substance of the issues and of the date fixed for the trial thereof in some newspaper of general circulation in the District, and may order such further publication as the case may require. And the District Court of the United States for the District of Columbia may from time to time prescribe and revise rules and regulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification. Personal service on absent parties shall not be essential to the jurisdiction of the court. The proceeding for impaneling a jury for the trial of said issues shall be the same as if they were being tried in the Circuit Court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceedings in error and to such revision as the common law provides, be *res judicata* as to all persons; nor shall the validity of such judgment be impeached or examined collaterally.

SUMMARY OF ARGUMENT.

1. The Court properly allowed background evidence showing the cause, extent, duration, and effect of decedent's addiction to alcohol and consequent uninterrupted mental deterioration in order to show decedent's testamentary capacity at the date of the execution of her will, as well as her susceptibility to fraud and undue influence. The reasonableness of the period considered depends upon the facts, and lies in the sound discretion of the Court. Such ruling should not be disturbed except for an abuse of discretion—which does not exist here.

2. The Court properly allowed a psychiatric expert in alcoholism to testify, in response to a hypothetical question based on facts in evidence, that decedent's mental condition on the date of the execution of the will would depend on how serious the actual deterioration was at that time.

3. The Court did not err in: (a) denying summary judgment in favor of appellant, (b) refusing to make M.

Marshall Morgan, Jr., an involuntary plaintiff, (c) commenting upon the unfounded statement made in summation by appellant's counsel and rebutted in summation by appellee's counsel, (d) denying appellant's motion for judgment N. O. V., or for a new trial, (e) refusing to direct a verdict for appellant, and (f) its instructions to the jury.

ARGUMENT.

I. The evidence showed an operation in 1932 which radically changed decedent's life. The operation was the cause of this change and marked a clear dichotomy between decedent's life before and after the operation. Thereafter, there was a complete change in her personality and habits and a steady decline in her physical and mental powers (J. A. 49). Obviously, decedent's mental deterioration began at some time. Therefore, it was proper to permit brief testimony to show decedent's normal existence before the operation, the operation, and the effect of the operation on decedent (J. A. 49-50, 140). The Court ruled, in the presence of the jury, that such testimony must "not be too extensive," and that the only issue before the jury was decedent's condition at the time of the execution of the will (J. A. 46-48, 166). The Court also so instructed the jury (J. A. 302).

Decedent began drinking after her operation in 1932. By 1934 she was drinking quite a bit, and increased her drinking steadily until by 1940 she was a complete alcoholic, drinking constantly from 10 or 11 o'clock in the morning through the evening (J. A. 50). Her conduct became more and more irrational, and finally in December 1941 appellee, on the advice of a doctor, moved her family away (J. A. 52-53, 140, 148). By 1942 decedent was in a mental fog most of the time (J. A. 131). Decedent was in Greenhill Institute for alcoholics for 10 days in 1942, but refused to co-operate (J. A. 53, 54, 90). She continued her drinking and stayed in a mental fog until her death in 1950 (J. A. 50, 55, 61, 78, 84).

The evidence shows a continuous mental deterioration which at the time of the execution of the will had progressed steadily for 14 years. Evidence on decedent's ability to make a will on the date of its execution was given (J. A. 101-02, 174-75). The jury could not have been given a true picture of decedent's mental condition when the will was executed without being given evidence concerning the cause of decedent's condition, the continuation and extent of her deterioration, and the result of the deterioration at the time she executed the will. To do otherwise, under the facts of this case, would require the selection of an arbitrary date, excluding all other evidence regardless of the light it threw on decedent's mental condition at the time of the execution of the will, as contended by appellant (J. A. 48). Such evidence also shed light on decedent's capacity to resist fraud or undue influence (J. A. 175-76, 243, 275).

The evidence on this point was necessary for an understanding of the case and was material to the issues of fraud, undue influence and testamentary capacity at the time she executed the will. In a similar case evidence going back 45 years and showing the cause, extent, continuance, and result of testatrix's mental deterioration was held properly admitted. *Peareson v. McNabb*, 190 S. W. (2d) 402 (Tex. Civ. App., 1945).

Appellant's objection goes, if it goes at all, to the weight to be accorded the evidence and not to its admissibility. *Metropolitan Life Ins. Co. v. Armstrong*, 85 F. (2d) 187, 193 (C. C. A. 8th, 1936). Appellant was, of course, free to rebut, contradict, or explain away the evidence as well as to comment on the weight to be accorded it by the jury.

It is settled that the admission or exclusion of evidence on the ground of remoteness lies in the sound discretion of the trial Court and will not be disturbed on appeal unless a clear abuse of discretion appears. *Boynton v. U. S.*, 83 U. S. App. D. C. 227; 167 F. (2d) 759; *Hart v. U. S.*, 76 U. S. App. D. C. 193; 130 F. (2d) 456; *Hannan v. U. S.*, 76 U. S. App. D. C. 118; 131 F. (2d) 441; *Metropolitan Life Ins Co. v. Armstrong*, *supra*.

The trial Court was meticulously careful throughout the trial. No abuse of discretion exists in this case and the ruling of the trial Court should be affirmed.

II. The Court did not err in allowing Dr. Marland's testimony. Dr. Marland's qualifications were conceded (J. A. 156). He had never known the decedent (J. A. 159). He was preliminarily asked what effect alcohol has on the body and mind of a person if used continuously. Dr. Marland stated that alcohol can cause a general physical and mental deterioration of personality and can cause certain specific physical ailments (J. A. 157-58). The doctor was then asked a hypothetical question to which appellant objected (J. A. 160). The question was then revised and asked again (J. A. 161). The question was again objected to (J. A. 168-69). The question was again modified to meet the specific objections (J. A. 170-72). The witness then answered the question conditionally, i. e. without giving any opinion as to whether or not decedent had testamentary capacity on the date of the execution of the will (J. A. 174-75, 178).

The ruling of the Court was that this evidence could be considered only for the purpose of determining decedent's testamentary capacity on the date of the execution of the will (J. A. 166). The Court so instructed the jury (J. A. 302).

The hypothetical question answered by Dr. Marland was based on evidence already in the record and was clearly stated (J. A. 172-174). The law is clear that an expert witness may testify on the basis of a hypothetical question which is bottomed on facts in evidence, but not necessarily on all the facts in evidence nor which may be put in evidence. It is noteworthy that every specific objection to the question on the ground that it was not based on the evidence was dealt with specifically and the question revised accordingly (J. A. 160-72). Appellee was, of course, free to cross-examine Dr. Marland or argue to the jury in any way he saw fit. The trial Court properly exercised

its discretion in ruling that the hypothetical question was proper. *Travelers Ins. Co. v. Drake*, 89 F. (2d) 47, 50 (C. C. A. 9th, 1947); *Metropolitan Life Ins. Co. v. Armstrong*, 85 F. (2d) 187, 190 (C. C. A. 8th, 1936); *New York Life Ins. Co. v. Doerksen*, 75 F. (2d) 96, 102 (C. C. A. 10th, 1935); *Virginia Beach Bus Line v. Campbell*, 73 F. (2d) 97, 99 (C. C. A. 4th, 1934). Certainly, in view of the answer to the question, appellant cannot seriously contend that he was in any way prejudiced.

III (a). The Court did not err in denying appellant's motion for summary judgment. Appellant had taken the deposition of only the appellee. In her deposition appellee readily admitted that decedent was able to rent rooms in her home, that she did not know the exact condition of decedent on the date of the execution of the will, that she had not actually seen appellant induce decedent to make the will in question, that she had not been consulted in the making of the will, and that she considered undue influence had been brought to bear because the will had been made within two weeks after the marriage. It is solely upon these excerpts from her extensive testimony that appellant argues that summary judgment should have been granted. Appellant also makes reference to "the flimsiness of the petition for caveat" (Br. 14). This petition follows almost verbatim the form as set forth in *Mersh, Probate Court Practice*, p. 218.

Appellant proceeds upon the theory that appellee, in a deposition where the rules of evidence have been relaxed so that it can be more useful for discovery, should be responsible for knowing and stating, whether or not asked, all the evidentiary facts upon which her case is based. Only rarely is fraud, undue influence, or lack of testamentary capacity susceptible of direct, unequivocal proof. *Duckett v. Duckett*, 77 U. S. App. D. C. 303; 134 F. (2d) 527. Particularly would it be rare to have all such proof in the hands or mind of only one person. Appellant could have obtained a list of appellee's witnesses in advance of

trial and taken their depositions had he desired to know all the facts; but appellant elected to do otherwise.

The portions of the testimony of appellee, which appellant relied on exclusively to obtain summary judgment, do not in any way establish that there was no genuine issue of fact to be tried. *Dewey v. Clark*, 86 U. S. App. D. C. 137, 180 F. (2d) 766. On the contrary, the other testimony of appellee in her deposition thoroughly negatives the theory that there were no issues of fact. Appellee had also testified that: (1) decedent was in an alcoholic daze most of the time (Dep. 19-20, 23); (2) decedent was of unsound mind and completely under appellant's influence (Dep. 21, 62); (3) appellant was supposed to have only a life estate in 3218 Klinge (Dep. 30); (4) decedent's drinking increased after she married appellant (Dep. 43); (5) decedent was afraid of appellant (Dep. 45).

III (b). The Court did not err in refusing to make M. Marshall Morgan, Jr. an involuntary plaintiff. Appellant urged this matter before the pre-trial court, the motions court (J. A. 19), and the trial Court (J. A. 20) with uniform results.

This issue is governed by Title 19, sections 307, 312, of the District Code (1940 Ed.). *In re Cottrill's Estate*, 39 F. Supp. 689 (D. C. D. C., 1941). Section 312 states that "any party in interest" may file a caveat. It does not require all heirs at law or next of kin to join in a caveat nor provide that such persons may be forced to join in the suit. Section 312 provides, among other things, that all heirs at law and next of kin shall have 10 days' notice of the caveat proceedings, that personal service on absent parties shall not be necessary, and that the action shall be *res judicata* as to all persons. All elements of section 312 look toward a will contest as in the nature of a proceeding *in rem*. There is no suggestion that another heir at law or next of kin is an indispensable party—or a party at all. Litigation under the statute has apparently been governed by the *in rem* theory. See: *Est. May E. Carr, Adm.*, 48, 447; cited in *Mersch, Probate Court Practice*, p. 217. Mor-

gan, before trial, filed a praecipe stating that he did not want to be a party (J. A. 13). The *in rem* theory of a will contest is adopted and thoroughly discussed in *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S. W. (2d) 935.

Appellant had but one motive in trying to have Morgan made a plaintiff—to discredit Morgan and thereby distract the jury from the real issues of the case. This is illustrated by appellant's unceasing attempts to drag Morgan's name and character into the trial. Appellant put in totally irrelevant testimony that Morgan: (1) in 1938 pestered appellee for money from the joint account of appellee and decedent (J. A. 77); (2) went to decedent's home and threatened to kill decedent and appellant (J. A. 110); (3) only visited decedent a few times during her last illness (J. A. 291); (4) did not love his mother (J. A. 251); (5) was often drunk, begging money, and in jail; often struck decedent, once attempted an assault on her with a weapon, was generally in continuous trouble, and was a mental case (J. A. 250-55).

Morgan could add nothing to the case as the issue was the validity of decedent's will. In view of the statute, Morgan was not an indispensable party and, under the circumstances, was not a necessary party. The Court properly exercised its discretion and its ruling should not be disturbed on appeal.

III (c). The Court did not err in commenting upon the statements of both counsel concerning Malloy's handwritten notes and the F. B. I. Malloy had identified certain papers as being his notes on the basis of which he composed the wills (J. A. 305, 228-29). Counsel for appellee had withdrawn these papers from the Court, with the permission of counsel for appellant, for an examination by an expert (J. A. 232). Nothing further was said until counsel for appellant, in his summation, stated that the facilities of the F. B. I. had been used by appellee in examining these papers (J. A. 304-05). No testimony upon which such an untrue, unfounded, and prejudicial inference could

be based had ever occurred. Counsel for appellee could not permit such a calculated misstatement to remain uncorrected before the jury. Therefore, in his summation counsel for appellee stated that the F. B. I. had absolutely no contact with the case, that counsel had himself taken them to a specialist, that Malloy was not guilty of any irregularity concerning the papers, and that he had been told by an expert that these papers were written at least two years ago. The Court then stated that both counsel had somewhat gone outside of the record and that "he (appellee's counsel) says it doesn't prove any fraud, and so, while he goes out of the record in saying that, it is a concession, if anything—it is not a claim with respect to it" (J. A. 305).

From these facts it is apparent that counsel for appellant initiated the subject of the F. B. I. examining the papers, that counsel for appellee merely rebutted this allegation, and, in so doing, specifically stated that these papers were what Malloy had said they were. The Court's comment was entirely factual and proper under the circumstances. (*Sorrels v. Alexander*, 79 U. S. App. D. C. 112; 142 F. (2d) 769; *Rosenberg v. District of Columbia*, 66 A. (2d) 489 (Mun. App. D. C., 1949); 64 C. J. Trial, section 93).

III (d). The Court did not err in denying appellant's motion for a new trial or judgment N. O. V. Appellant states that the Hodgkin affidavit "completely contradicted and impeached the testimony of the caveatrix" and therefore a new trial should have been granted (Br. 26).

The Hodgkin affidavit was filed June 18, 1951, 25 days after the jury had reached its verdict (J. A. 25, 20). This affidavit, dated June 14, 1951, states that affiant was subpoenaed to appear before the Court on June 11, 1951, 18 days after the jury's verdict, but illness prevented her appearance. The affidavit assumes to contradict appellee in one particular, the date decedent was a patient at Waverly Sanatorium. Miss Hodgkin's records, upon which she relies exclusively, have never been produced, nor, of course, has Miss Hodgkin been subject to cross-examination to

determine the accuracy of her records. No explanation has been made as to why Miss Hodgkin was not called as a witness at trial or her deposition taken before trial. Appellant was aware of the fact that appellee had sworn that decedent was a patient at Waverly in 1941 (Dep. 57).

Appellant could have used Miss Hodgkin's testimony to test appellee's memory or credibility on cross-examination. Since he failed to do so, and since Miss Hodgkin's testimony touches only one fact in the entire case—the date of decedent's stay in Waverly—the Court was correct in denying appellant's motion. *Travelers Ins. Co. v. Person*, 58 F. (2d) 210 (C. C. A. 8th, 1932). There was no abuse of discretion and the Court's ruling should not be disturbed. *Ruppert v. Ruppert*, 77 U. S. App. D. C. 65; 134 F. (2d) 479; *Stewart v. Capital Transit Co.*, 70 App. D. C. 346, 108 F. (2d) 1.

III (e). The Court did not err in refusing to direct a verdict for appellant at the conclusion of appellee's case or at the conclusion of all the evidence. At either point sufficient evidence had been presented for the jury or the Court to decide for appellee by resolving the facts against appellant, making inferences from the evidence favorable to appellee. *B. & O. RR v. Postom*, 85 U. S. App. D. C., 207, 177 F. (2d) 53; *McCartney v. Holmquist*, 70 App. D. C. 334; 106 F. (2d) 855.

III(f). The Court did not err in its instructions to the jury. Instructions to the jury should fairly state the law applicable to the case and need not be cast in any particular language. *Thompson v. Smith*, 70 App. D. C. 65; 103 F. (2d) 936. Court Instruction B (J. A. 302) fairly and adequately states the law concerning the criteria of testamentary capacity. *Lewis v. American Security & Trust Co.*, 53 App. D. C. 258; 289 F. 916. The colorful prose of appellant's prayers Nos. 3 and 4 do not change the applicable law and have no useful purpose insofar as they purport to give the law to the jury.

Appellant's prayer No. 8 does not properly state the law on this point. It is submitted that appellee's prayer No. 3

(J. A. 297), which was granted as amended, properly states the law, as delineated in *Thompson v. Smith*, supra.

Appellant's prayer No. 10 was inapposite to the facts of the case. Appellee's elder daughter gave birth to a child on the morning appellee took the stand (Tr. 49). Her younger daughter was 13 at the time of the execution of the will. Her brother, M. Marshall Morgan, Jr., was under appellant's subpoena during the entire trial. He had previously indicated that he did not want to be a party to the case (J. A. 13). Appellee's children could add little to the case but cumulative testimony, due to their ages and the fact that appellee had moved for their sakes to prevent decedent from having extensive contact with them (J. A. 49-50, 140). The friends of decedent who were available and not called as witnesses would have added only cumulative testimony and prolonged the trial. Only if appellant had introduced evidence to contradict such testimony would such witnesses have added anything. M. Marshall Morgan, Jr., also could have added only cumulative testimony. In view of his wishes in this matter and the assault on his character which awaited him (J. A. 250-55) appellee wished to spare him the ordeal. Appellant was, of course, free to take the deposition of any of these persons, call them as witnesses, or comment to the jury on their absence. Appellant did not, and does not, make any showing that these persons would be "stronger witnesses on material points" (Br. 25) nor, under the facts of this case, is there any presumption that such persons would be stronger witnesses on material points. *Century Indemnity Co. v. Arnold* 153 F. (2d) 531, 534 (C. C. A. 2d, 1946).

In deleting the final paragraph of appellant's prayer No. 2 (J. A. 300) the Court did not change the prayer concerning the presumption of testamentary capacity and of testamentary capacity where due execution is proved. The language that such presumptions "ought not to be imperiled by inconclusive or uncertain testimony" was improper under the facts of the case since it would brand appellee's case as inconclusive or uncertain, which was a matter the jury was quite able to determine for itself.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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